(8)

Supreme Court, U.S.
FILED
MAY 25 2000
CLERK

NO. 99-1185

IN THE SUPREME COURT OF THE UNITED STATES

MARK SELING, Superintendent,
Special Commitment Center,

Petitioner,

v.

ANDRE BRIGHAM YOUNG,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 14, 2000
CERTIORARI GRANTED MARCH 20, 2000

158 P

TABLE OF CONTENTS

Relevant Docket Entries, Ninth Circuit, U.S. District Court (W.D. Wa.), Washington State Supreme Court, King County Superior Court JA-1

Task Force on Community Protection, Final Report (pp. II-20 to II-22) JA-15

Petition for civil commitment (KCSC) JA-19

Certification for Determination of Probable Cause (KCSC) JA-20

Motion and Order Determining Existence of Probable Cause and Directing Issuance of a Warrant for Respondent's Custodial Detention (KCSC) JA-24

Order of Transport (KCSC) JA-26

Order of Transportation (KCSC) JA-27

Jury Instruction No. 8 (KCSC) JA-29

Order of Commitment (KCSC) JA-30

Motion for Reconsideration with two attachments (WSSC) JA-32

Findings of Fact and Conclusions of Law on Respondent's Motion to Dismiss Based on Unconstitutional Conditions of Confinement at SCC (KCSC) JA-49

Order and Injunction (*Turay v. Seling, et al*)
(USDC) JA-64

Amended Petition for Writ of Habeas Corpus
(USDC) JA-69

Findings of Fact, Conclusions of Law and Order
on Respondent's Motion to Dismiss Based on
Unconstitutional Conditions of Confinement
at Special Commitment Center (*In re Campbell)*
(KCSC) JA-78

Order on Cross-Motions for Summary Judgment
(USDC) JA-91

Order on Plaintiff's Renewed Motion for
Contempt and Defendants' Renewed Motion
for Release from Injunction (*Turay v. Seling, et al*)
(USDC) JA-111

Findings of Fact, Conclusions of Law, and
Order re Injunctive Relief (*Turay v. Seling, et al*)
(USDC) JA-116

Order Amending Order of November 25, 1998,
Denying Motion for Stay Pending Appeal, and
and Renoting Motion to Defer Award of
Attorneys' Fees (*Turay v. Seling, et al*) (USDC).....JA-139

Order Allowing Certiorari (USSC).....JA-152

Order Granting In Forma Pauperis Motion
(USSC).....JA-153

Revised Code of Washington 9A.76.120.....JA-154

Revised Code of Washington 10.77.220.....JA-155

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

98-35377

ANDRE BRIGHAM YOUNG,

Petitioner-Appellant,

vs.

DAVID WESTON, Superintendent of the
Special Commitment Center,

Respondent-Appellee.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/22/98	Filed original and 15 copies Appellant Andre Brigham Young's substitute opening brief 80 pages; 5 exc of rec in 3 vol; served on 9/18/98 [98-35377] (ft) [98-35377]
10/23/98	Filed original and 15 copies appellee David Weston's 62 pages brief, 1 Exc. vols; served on 10/19/98 [98-35377] (ft) [98-35377]
12/11/98	Filed original and 15 copies Andre Brigham Young reply brief, (Informal: n) 28 pages; served on 11/23/98 [98-35377] (ft) [98-35377]
3/26/99	Filed order (Deputy Clerk: gb) The parties are requested to file letter briefs addressing the status and relevance to this proceeding of the continuing state court proceedings regarding

DATE	PROCEEDINGS
	the conditions of Mr. Young's confinement. The letter briefs shall confine themselves to the discussion of this issue. The letter briefs shall not exceed three double-spaced pages in length and shall be filed with the Clerk's Office no later than noon, 4/1/99. (phoned; 11:10) [98-35377] (ft) [98-35377]
3/31/99	Filed Appellee David Weston in 98-35377's response to order of the court; (Fax copy Letter Brief, 3 pages); served on 3/31/99 (Faxed to Panel) [98-35377] (ft) [98-35377]
4/8/99	Filed Appellant Andre Brigham Young in 98-35377's response to court order of 3/26/99; served on 4/2/99 (Letter brief) (Fax to Panel) [98-35377] (ft) [98-35377]
4/14/99	ARGUED AND SUBMITTED TO Harry PREGERSON, David R. THOMPSON, Robert J. Kelleher [98-35377] (jmk) [98-35377]
5/20/99	FILED OPINION: REVERSED and REMANDED in part. AFFIRMED in part. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Harry PREGERSON, author; David R. THOMPSON; Robert J. Kelleher.) FILED AND ENTERED JUDGMENT. [98-35377] (ft) [98-35377]
6/17/99	Filed original and 50 copies Appellee David Weston in 98-35377 petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 6/16/99 (PANEL AND ALL ACTIVE JUDGES) [98-35377] (ft) [98-35377]

DATE	PROCEEDINGS
6/24/99	Filed original and 50 copies State of CA in 98-35377's amicus curiae brief (in support of David Weston's petition for rehearing en banc) of 8 pages; served on 6/24/99 (PANEL AND ALL ACTIVE JUDGES) [98-35377] (ft) [98-35377]
8/10/99	Filed Appellant Andre Brigham Young in 98-35377's response to petition for rehearing en banc; served on 5/20/99 (PANEL AND ALL ACTIVE JUDGES) [98-35377] (ft) [98-35377]
9/16/99	Filed order and amended opinion (Judges Harry PREGERSON, David R. THOMPSON, Robert J. Kelleher) The opinion filed 5/20/99 is amended as follows:.....See opinion.....With this amendment the petition for rehearing is denied and the suggestio [sic] for rehearing en banc is rejected. (Orig. opinion id:) REVERSED and REMANDED in part. AFFIRMED in part. [98-35377] (ft) [98-35377]
9/23/99	Filed David Weston in 98-35377 motion to stay the mandate. [98-35377] served on 9/22/99 [PANEL] (ft) [98-35377]
10/19/99	Filed order (Harry PREGERSON, David R. THOMPSON, Robert J. Kelleher): The motion to stay the issuance of the mandate is granted. [98-35377] (ft) [98-35377]
12/10/99	Received Appellee David Weston in 98-35377 letter dated 12/7/99 re: Asking that the Order staying the mandate be extended. (PANEL) [98-35377] (ft) [98-35377]

DATE	PROCEEDINGS
12/13/99	Received U.S. Supreme Court letter dated 11/30/99 re: Application for an ext of time within which to file a petition for a writ of certiorari in this case has been presented to Justice O'Connor who on 11/30/99 extended the time to and including 1/14/00. [98-35377] (ft) [98-35377]
1/7/00	Filed order (Harry PREGERSON, David R. THOMPSON, Robert J. Kelleher): The request for a continuance of the stay of the issuance of the mandate in this matter is granted. This order staying issuance of the mandate shall remain in effect pending final disposition of a petition for certiorari to the U.S. Supreme Court which is due to be filed with that court on or before 1/14/00. [98-35377] (ft) [98-35377]
1/24/00	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 99-1185 filed on 1/14/00. [98-35377] (ft) [98-35377]

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

94-CV-480

YOUNG,

vs.

WESTON.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
3/31/94	1	PETITION FOR WRIT OF HABEAS CORPUS under 28 USC 2254 by petitioner Andre Brigham Young Receipt No. 213934 (lr) [Entry date 04/06/94]
4/8/94	4	ORDER by Judge John C. Coughenour of reference to Magistrate Judge John L. Weinberg (cc: all counsel, JLW, JCC) (lr) [Entry date 04/11/94]
8/12/94	35	MOTION by respondent for summary judgment noted for 9/9/94 (ds) [Entry date 08/15/94]
8/19/94	166	MEMORANDUM OF AUTHORITIES by respondent in support of motion for summary judgment [35-1] (gm) [Entry date 02/12/98]

DATE	NO.	PROCEEDINGS
10/27/94	56	MINUTE ORDER: by direction of Magistrate Judge Philip K. Sweigert: GRANTING petitioner's motion for leave to file amended petition for writ of habeas corpus [50-1]. Respondents' answer to added claim due w/in 30 days. (cc: counsel, Judges JCC & PKS, JPM) ent 10/27/94 (ds)
10/27/94	57	AMENDED PETITION for writ of h/c by petitioner Andre Brigham Young (ds)
10/31/94	58	MOTION by petitioner for summary judgment or in the alternative for an evidentiary hearing noted for 12/2/94 (ds) [Entry date 11/01/94]
11/2/94	63	MEMORANDUM of law in support of a petition for writ of habeas corpus, (RESPONSE by petitioner) OPPOSITION to respondents' motion for summary judgment [35-1] AND REPLY in support of motion for summary judgment or in the alternative for an evidentiary hearing [58-1] (ds)
11/3/94	65	MOTION for ACLU to appear as amicus curiae and to file a brief noted for 11/18/94 (ds) [Entry date 11/04/94]
11/7/94	70	ORDER by Magistrate Judge Philip K. Sweigert: The ACLU's motion to shorten time [66-1] is GRANTED. The motion for ACLU to appear as amicus curiae and to file a brief [65-1] is noted for 11/9/94. (cc: counsel, Judges JCC & PKS) ent 11/7/94 (ds)

DATE	NO.	PROCEEDINGS
11/9/94	72	ORDER by Magistrate Judge Philip K. Sweigert GRANTING motion for ACLU to appear as amicus curiae and to file a brief [65-1] (cc: counsel, Judge) (ds)
11/9/94	73	(RESPONSE) MEMORANDUM of amicus curiae ACLU in opposition to respondent's motion for summary judgment [35-1] and in support of petitioner's writ of habeas corpus (ds)
11/16/94	74	MOTION of Washington State Psychiatric Association to submit amicus brief on behalf of petitioner noted for 12/2/94 (ds) [Entry date 11/17/94]
1/5/95	86	MINUTE ORDER: by direction of Magistrate Judge Philip K. Sweigert: The motion of Washington State Psychiatric Association to submit amicus brief on behalf of petitioner [74-1] is GRANTED. (cc: counsel, Judge, PKS, JCC, JPM) ent 1/5/95 (ds)
1/5/95	87	AMICUS BRIEF submitted by amicus WA State Psych Assoc on behalf of petitioner (ds)
2/2/95	94	REPLY by petitioner to State's RESPONSE to motion for summary judgment or in the alternative for an evidentiary hearing [58-1] (ds) [Entry date 02/03/95]
2/8/95	97	RESPONSE by respondent to petitioner's motion for summary judgment or in the alternative for an

DATE	NO.	PROCEEDINGS
		evidentiary hearing [58-1] (ds) [Edit date 03/20/95]
3/24/95	109	MINUTES: Oral Argument on motions for summary judgment: PKS; Dep Clerk: S. Wilsco; CR: Steve Broscheid; case called. Cnsl present: Sarah Sappington, Don Porter. Courth [sic] hears from Robert Boruchowitz & Sarah Sappington. Court take matter under consideration & will submit Report & Recommendation to Judge Coughenour. (gm)
5/4/95	114	MINUTE ORDER: by Judge John C. Coughenour: The Court hereby orders that the reference of this matter to Magistrate Judge Sweigert is withdrawn. The Court will advise the parties if further briefing or oral argument is necessary. terminating case referral to Magistrate Judge Philip K. Sweigert. [58-1], [35-1] (cc: counsel, Judge, JM, PKS) (gm) [Edit date 05/04/95]
8/25/95	117	ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT by Judge John C. Coughenour: The Court concludes that Washington's Sexually Violent Predator Statute, Wash. Rev. Code 71.09, violates the substantive due process component of the Fourteenth Amendment, the Ex Post Facto Clause, and the Double Jeopardy Clause. The other issues raised in the petition for a writ of habeas corpus need not be addressed. The writ is

DATE	NO.	PROCEEDINGS
		GRANTED. In anticipation of appeal, the Court directs the parties to brief the issue of release pending appeal. Each party shall file a brief on this issue no later than 9/5/95. The parties may file responsive briefs no later than 9/7/95. The parties shall indicate whether oral argument is requested. [58-1], [35-1] (cc: counsel, Judge) (gm)
8/25/95	118	JUDGMENT: Decision by Court. It is Ordered and Adjudged the Writ of Habeas Corpus is GRANTED. case terminated (cc: counsel, Judge, Jgm. Book) Entered on: 8/25/95 (gm)
9/5/95	120	MOTION by respondent David Weston, respondent WA State of for stay of writ pending appeal (gm)
9/11/95	128	ORDER by Judge John C. Coughenour GRANTING STAY PENDING APPEAL: This matter comes before the Court on the State's motion for a stay pending appeal. The Court heard oral argument on 9/8/95. The Court concludes that the balance of relevant interests tips in favor of granting a stay pending appeal. Accordingly, the State's motion for a stay is GRANTED. Mr. Young shall remain in detention during the pendency of the appeal. [120-1] (cc: counsel, Judge) (gm)
9/14/95	129	NOTICE OF APPEAL by respondent David Weston from Dist. Court

DATE	NO.	PROCEEDINGS
		decision, [117-1] (cc: CCA, Judge, counsel) (dc) [Entry date 09/15/95]
2/12/96	138	ORDER (CCA) [95-35958] The motion of the American Civil Liberties Union of WA Foundation to diel [sic] an amicus brief is granted. The brf lodged with the court is ordered filed. The accompanying appendix is rejected. The motion of the WA State Psychiatric Assoc. to file an amicus brf is granted. The brf lodged with the court is ordered filed. (ss) [Entry date 02/15/96]
8/5/96	143	ORDER (CCA) [95-35958] The appeal is withdrawn from submission pending the Supreme Court's disposition of Matter of Care & Treatment of Hendricks, 912 P.2d 129 (1996, cert. granted 64 U.S.L.W. 3830, 3837 (6/17/96), and further order of this order. (seal) [Entry date 08/12/96]
8/30/97	150	MANDATE (95-35958) from Circuit Court of Appeals REMANDING the matter back to the District Court [Appeal [129-1] (cc: JCC, all counsel) Order attached. (lb) [Entry date 09/03/97]
11/28/97	155	SUPPLEMENTAL BRIEF ON REMAND by petitioner [154-1] (gm) [Entry date 12/01/97]
12/19/97	158	RESPONSE to Petitioner's Supplemental Brief by respondents (gm) [Entry date 12/23/97]

DATE	NO.	PROCEEDINGS
1/2/98	159	REPLY BRIEF by petitioner Andre Brigham Young on remand [150-1] (gm) [Entry date 01/05/98]
1/30/98	164	MINUTES: Oral argument: JCC; Dep Clerk: J. Mahnke; CR: Joe Roth; Cnsl present: R. Burochowitz [sic]/Sara [sic] Sappington. Called. cnsl heard in argument. The Court will issue a written decision. (gm) [Entry date 02/02/98]
2/10/98	165	ORDER by Judge John C. Coughenour: Petitiner's [sic] writ of habeas corpus is hereby DENIED. (See Order for Details) [157-1], [154-1], [151-1] (cc: counsel, Judge) (gm)
2/25/98	167	MOTION by petitioner Andre Brigham Young to alter judgment (gm) [Entry date 02/26/98]
2/25/98	168	Appendices in support of motion to alter judgment (FILED IN EXPANDO) (gm) [Entry date 02/26/98]
3/9/98	170	RESPONSE by respondents to motion to alter judgment [167-1] (gm) [Entry date 03/10/98]
3/13/98	175	MINUTE ORDER: by direction of Judge John C. Coughenour DENYING Petitioner's motion to alter judgment [167-1] (cc: counsel, Judge) (gm)
3/19/98	176	NOTICE OF APPEAL by petitioner Andre Brigham Young from Dist. Court decision [175-1] (cc: CCA, JCC, counsel) (lb) [Entry date 03/26/98]

DATE	NO.	PROCEEDINGS
3/26/98	177	ORDER GRANTING CERTIFICATE OF APPEALABILITY by Judge John C. Coughenour (cc: CCA, all counsel, JCC) (lb)
7/14/99	183	ORDER (CCA 98-35377) Petitioner is requested to file a response to the petition for rehearing and suggestion for rehearing en banc. Said response shall be filed on or before 7/30/99. (lb) [Entry date 08/02/99]
10/21/99	184	ORDER (CCA 98-35377) The motion to stay the issuance of the mandate is granted. (lb) [Entry date 10/22/99]

THE SUPREME COURT OF WASHINGTON

57837-1

In re the Personal Restraint Petition of:

ANDRE BRIGHAM YOUNG

Petitioner.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
08/09/93	OPINION 65.40) 122 Wn.2d 1 Filed By: Durham, Barbara Mae (SCJ 02020) Status: Decision Terminating Review Filed Document Action: Filed
09/20/93	ORDER ON MOTIONS Order Denying Motions For Reconsideration 253/147 Filed By: Andersen, James A (SCJ 04336) Document Action: Filed

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

90-2-21319-6

In re the Detention of:

ANDRE B. YOUNG,

Respondent.

RELEVANT DOCKET ENTRIES

SUB #	DATE	DESCRIPTION
1	10/24/90	Petition For Detention
3	10/24/90	Certification For Probable Cause
4	10/24/90	Order For Warrant Issd
66	01/18/91	Order to Transport to K C Jail
69.4	01/22/91	Trial Minutes 051.50 Jyp 020.00 Cr Diane Meredith Cr Marci Cammon Cr Velma Haynes Judge Lloyd Bever, Dept 2
136	03/08/91	Order of Commitment Comnt Issd 03-08-91

Task Force
On
Community
Protection

The Seal of the State of Washington 1889

Final Report
to
Booth Gardner
Governor
State of Washington

[pp. II-20 to II-22]

CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

The Task Force was created principally to answer one question: What gaps in our law and administrative structures allow the release of known dangerous offenders who are highly likely to commit very serious crimes?

The Task Force reviewed the current laws for the adult and juvenile criminal systems and the involuntary treatment laws. In each system, the Task Force identified an "end point" for state control. These end points are as follows.

- Offenders committed under the Sentencing Reform Act are sentenced to a definite term. The most serious offenders are supervised in the community for one year following release. When the confinement and supervision term expire, the state's control over these offenders ceases.

- State prison inmates sentenced under the indeterminate system (crimes committed before 1984) serve terms set by the Indeterminate Sentence Review Board and are released when they are "fit subjects for release." Some offenders are never found eligible for parole and serve their entire maximum term in prison; the majority are placed on parole. The Board loses all jurisdiction over the offender when the statutory maximum for the crime expires (five years for Class C felonies, ten years for Class B, and life for Class A). Many offenders who committed very serious crimes and are viewed as very dangerous were convicted of Class B offenses.
- The juvenile system loses all jurisdiction on juvenile offenders when they turn 18, unless the jurisdiction is extended by the juvenile court before the offender turns 18 and then the age is extended to 21.
- Persons found Not Guilty by Reason of Insanity under the criminal insanity law may be held for the statutory maximum of the crime they committed or until their mental illness is stabilized and they no longer present a danger to others. They can be held beyond the statutory maximum if they are found dangerous to self or others and are detained under the involuntary treatment law.
- Persons found incompetent to stand trial can be held for up to one year and 15 days (90 days if the person is developmentally disabled) in order to re-establish their competency. If competency cannot be re-established, the charges are dismissed without prejudice (charges can be refiled if the person regains competency at a later time). A person found incompetent to stand trial can be referred to a state hospital and held under the involuntary treatment law if the person is dangerous to self or others or is gravely disabled.

Civil commitment under the involuntary treatment law allows indefinite commitment, but is quite restrictive in its

definition. Under current laws, sexually violent predators only qualify for civil detention when a mental illness or mental disorder is present. The Task Force examined the histories of some individual violent predators who had been judged not to have a mental illness or mental disorder and therefore were not detainable.

The Task Force concluded that existing laws do not offer a sufficient safety net for confinement of sexually violent predators who meet these end points. The Task Force believes a safety net must be created to reduce future acts of violence.

The Task Force proposes creating a new civil commitment statute for sexually violent predators. Sexually violent predators are defined in the following ways.

- A person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence.
- The proposed definition of "predatory" is: acts directed towards strangers or towards individuals with whom a relationship has been established or promoted for the primary purpose of victimization.
- Sexual violence includes sex offenses, and also offenses with a special finding of sexual intent. "Sexual violence" means acts defined in RCW 9.A as Rape in the First Degree, Rape in the Second Degree, Rape of a Child in the First or Second Degree, Indecent Liberties by Forcible Compulsion, Child Molestation in the First or Second Degree, and any act of Murder in the First or Second Degree, Assault in the First or Second Degree, Kidnapping in the First or Second Degree, Burglary in the First Degree, and Residential Burglary if such act has been determined to have been sexually motivated.

Convictions for attempts or conspiracies to commit are also included in the definition.

The Task Force believes statutory requirements and procedural rights must be rigorous and constitutionally sound, and include the right to a jury trial, the right to counsel, the right to offer evidence and cross-examine witnesses, and the right to require the state to prove its case beyond a reasonable doubt.

During the period of confinement, the person will be treated by psychiatrists and other professional experts using an individualized treatment plan. A formal examination of the person's mental condition will be conducted each year and the written report made available to the court which committed the person.

If the treatment professionals determine that the person's mental abnormality or personality disorder has changed and the person is not likely to commit predatory acts of sexual violence, the person can petition the court for release. The burden of proof shall be on the state to show by a preponderance of evidence that the petitioner's mental abnormality or personality disorder has not changed and the person is not safe to be at large and that if released, it is likely the person will commit predatory acts of sexual violence. The person also has the right to petition the court for release without the endorsement of the treatment professionals. In this situation, the person has the burden of proving he or she is safe to be at large and, if released, will no longer commit predatory acts of sexual violence.

[Filed October 24, 1990]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Detention of ANDRE BRIGHAM YOUNG,	) NO. 90-2-21319-6
	) PETITION
Respondent.	)

I, Norm Maleng, Prosecuting Attorney for King County, in the name and by the authority of the State of Washington, do allege that respondent Andre Brigham Young is a sexually violent predator, given the following:

Respondent Young has been convicted in King County, Washington, of a sexually violent offense, to wit: Rape in the First Degree, defined in RCW 9A.44.040, and his sentence on that conviction is about to expire on October 25, 1990. Furthermore, respondent suffers from a mental abnormality or personality disorder which makes him likely to engage in acts of sexual violence directed toward strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization;

Therefore, pursuant to § 1001-1013 of Chapter 3, Laws of 1990, respondent should be committed to the custody of the Department of Social and Health Services in a secure facility for control, care, and treatment until such time as his mental abnormality or personality disorder has so changed that he is safe to be at large.

NORM MALENG
King County Prosecuting Attorney
/s/Tim M. Blood
TIMOTHY M. BLOOD
WSBA ID #91002
Deputy Prosecuting Attorney

[Filed October 24, 1990]
90-2-21319-6

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

That Timothy M. Blood is a Deputy Prosecuting Attorney for King County, and is familiar with the investigation conducted by the Washington State Department of Corrections and various law enforcement agencies in King, Pierce and Thurston Counties relating to respondent Andre Brigham Young;

Pursuant to §§ 1001-1013 of Chapter 3, Laws of 1990, petitioner State of Washington sets forth the following in support of its motion for the determination of probable cause that respondent Andre Brigham Young is a sexually violent predator.

In the last 28 years, respondent Andre Young has been convicted of six felony rapes, five of which were Rapes in the First Degree. He has been at large in the community, with the opportunity to rape, only 11 of those 28 years. All of his known rapes have been against adult female strangers.

Respondent's first known rapes include four Rapes in the First Degree, all of which he was convicted in October, 1963, after a jury trial in Pierce County Superior Court Cause Number 34699. He committed those four rapes in the months of September, October, and November, 1962. In each of the four instances, respondent committed the sexual assault on an adult female stranger, by penile-vaginal intercourse, after unlawfully entering her residence. In at least two of the 1962 rapes, respondent was armed with a knife, and two of his convictions on those rapes include a deadly weapon finding.

After being sentenced on the 1962 rapes, respondent was subsequently released from custody on an appeal bond in March, 1964. Less than two months later, in May 1964,

respondent unlawfully entered an adult female stranger's residence in Thurston County. Once in the victim's home, respondent robbed her of property, tied her up, pulled his penis out of his clothing, and spoke of raping her, but never followed through with the act. He eventually fled her residence. Although respondent was charged for those acts in Thurston County Superior Court Cause Number C-3097, the matter was never disposed of on its merits as respondent came to be adjudged incompetent to stand trial.

After committing the above-referenced acts in Thurston County in 1964, respondent remained in the custody of the Department of Corrections on his four 1962 rapes until January 1972, at which time he was paroled. When he committed his next known rape on October 9, 1976, he was still on parole, and had been out in the community for less than five years.

In committing the 1976 offense, respondent again unlawfully entered an adult female stranger's residence. At the time, this particular victim was asleep in her Auburn apartment. She awoke to find respondent standing over her, with coverings over his hands and part of his face. After briefly holding a fork to her throat, he announced to his victim that he was going to rape her. The terrified woman did not physicaliy or verbally resist as respondent then entered her vagina with his penis and subjected her to intercourse. In connection with this incident, respondent pleaded guilty to Rape in the Third Degree in January, 1977, in King County Superior Court Cause Number 78895.

After being sentenced on the 1976 rape, respondent returned to the Department of Corrections until June, 1980, when he was again paroled. He had been at large for less than 5 ⅓ years when he committed his most recent known rape on November 8, 1985.

In committing the 1985 rape, respondent forced his way into the home of yet another adult female stranger's home; this woman's home was in south Seattle. With socks

covering his hands, and what felt to his victim like a gun underneath his jacket, respondent forced the woman into a bedroom of her home and raped her by penile-vaginal intercourse. He then fled from her home with her telephone in his hands. In connection with these acts, respondent was convicted of Rape in the First Degree after a jury trial in August, 1986, in King County Superior Court Cause Number 86-1-00483-8.

On his most recent rape conviction, respondent was once again sentenced to a term of confinement with the Department of Corrections. He is presently scheduled to be released out into the community on October 25, 1990.

Over the years, respondent has consistently denied committing any of the above-referenced crimes of which he has been convicted. With respect to his Rape in the Third Degree conviction, he has repeatedly asserted that the sexual act was consensual. With respect to his other five convictions, he has repeatedly claimed that each of the five victims mistakenly identified him as her rapist. Not surprisingly, respondent is not known to have ever sought out or obtained any professional sex offender treatment in the last 28 years.

Recently, a review of respondent's records at the Department of Corrections was conducted independently by two different psychologists. Those records include virtually all of the facts set forth above, as well as a great deal of other historical information on respondent.

Dr. Savio Chan, Ph.D., a psychologist with the Department of Corrections, completed his review of respondent's records on or about August 13, 1990. Based on the nature, pattern, and number of rapes that respondent has committed, Dr. Chan concluded that respondent likely has "a psychological abnormality . . . in the form of sexual sadism which has apparently been present for at least 25 years." Assuming the correctness of that diagnosis, Dr. Chan further concluded that respondent "has a very high likelihood to

engage in acts of sexual violence [against strangers] in the future."

Dr. Irwin S. Dreiblatt, Ph.D., a clinical psychologist in private practice, completed his review of respondent's records on or about October 6, 1990. Dr. Dreiblatt has concluded that respondent appears to presently suffer from mental abnormalities in the forms of "a severe, chronic paraphilia (sexual disorder)," and "sexual sadism." The psychologist has also concluded that respondent likely has a "mixed personality disorder with primarily paranoid and antisocial features." Dr. Dreiblatt has further concluded that, taken separately or in combination, respondent's mental abnormalities and personality disorders "affect his volitional control surrounding sexual conduct and predispose him to commit serious, violent acts against [women strangers]" and "create . . . the likelihood" that he will commit such violent sexual acts in the future.

Under penalty of perjury under the laws of the state of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 24th day of October, 1990 at Seattle, Washington.

/s/Tim M. Blood
TIMOTHY M. BLOOD
WSBA ID #91002
Deputy Prosecuting Attorney

[Filed October 24, 1990]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Detention of	) NO. 90-2-21319-6
	)
ANDRE BRIGHAM YOUNG,	) MOTION AND ORDER) DETERMINING) EXISTENCE OF
Respondent.	) PROBABLE CAUSE AND) DIRECTING ISSUANCE) OF A WARRANT FOR) RESPONDENT'S) CUSTODIAL DETENTION

MOTION

The petitioner, State of Washington, having informed the court that it is filing herein a petition alleging that respondent is a sexually violent predator, now moves the court for an order determining the existence of probable cause and directing the issuance of a warrant for respondent's custodial detention.

In connection with this motion, the petitioner offers the information set forth in the affidavit attached to the petition herein.

NORM MALENG
King County Prosecuting Attorney

/s/Tim M. Blood
TIMOTHY M. BLOOD, WSBA ID #91002
Deputy Prosecuting Attorney

ORDER

The court, having reviewed the affidavit submitted herein, hereby determines that probable cause exists to believe that the above-named respondent is a sexually violent predator as alleged in the petition herein; and

IT IS ORDERED that the Clerk of the Superior Court issue a warrant, returnable forthwith, for the custodial detention of the above-named respondent, with no bail pending appearance before the court; and

IT IS FURTHER ORDERED that upon his custodial detention, the above-named respondent shall be transferred pursuant to §1004 of Chapter 3, Laws of 1990, to the Special Commitment Center of the Department of Social and Health Services at Monroe, Washington for an evaluation as to whether the respondent is a sexually violent predator.

DONE IN OPEN COURT this 24th day of October, 1990.

/s/Charles Johnson
JUDGE

Presented by:

/s/Tim. M. Blood
TIMOTHY M. BLOOD, WSBA ID #91002
Deputy Prosecuting Attorney

[Filed October 24, 1990]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Detention of	)	
	)	
ANDRE BRIGHAM YOUNG,	)	NO. 90-2-21319-6
	)	
	)	ORDER OF TRANSPORT
Respondent.	)	
	)	

THIS MATTER having come before the court on this 24th day of October, 1990, the court having found that probable cause exists to believe that the above-named respondent is a sexually violent predator as alleged in the petition herein, and having directed the issuance of a warrant for the respondent's custodial detention, does hereby direct and order the Department of Corrections to transfer the respondent, Andre Brigham Young, from the Twin Rivers Corrections Center at Monroe, Washington, to the Special Commitment Center of the Department of Social and Health Services, located in Monroe, Washington, no later than October 25th, 1990, for custodial detention and evaluation pursuant to the court's order.

DONE IN OPEN COURT this 24th day of October, 1990.

/s/Charles Johnson
JUDGE

Presented by:

/s/Tim M. Blood
TIMOTHY M. BLOOD, WSBA #91002
Deputy Prosecuting Attorney

[Filed January 18, 1991]

IN SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

In re the Detention of	)	
	)	
ANDRE BRIGHAM YOUNG,	)	NO. 90-2-21319-6
	)	
	)	ORDER OF
Respondent.	)	TRANSPORTATION
	)	

THIS MATTER having come on before the undersigned Judge of the above-entitled court, the respondent, ANDRE BRIGHAM YOUNG, presently incarcerated at the Special Commitment Center ("SCC") of the Department of Social & Health Services ("DSHS") in Monroe, Washington, a trial having been scheduled for Monday, January 28, 1991 in this case, and Mr. Young's attendance being required at that hearing, now, therefore,

IT IS HEREBY ORDERED that the King County Sheriff, Department of Public Safety, transport ANDRE BRIGHAM YOUNG from DSHS custody at SCC to the King County Jail no later than January 24, 1991.

IT IS FURTHER ORDERED that a certified copy of this order be provided to Mr. Young's counsel at public expense.

DONE IN OPEN COURT this 18th day of January, 1991.

/s/Lloyd Bever
THE HONORABLE LLOYD BEVER

Presented by:

/s/Ann Engelhard
ANNIE ENGELHARD,
No. 15392
Attorney for Respondent

Approved as to Form:

/s/Tim Blood
TIM BLOOD, No. 14004
Deputy Prosecuting Attorney

INSTRUCTION NO. 8

To find that the respondent, Andre Brigham Young, is a sexually violent predator, each of the following elements must be proved beyond a reasonable doubt:

(1) That the respondent has been convicted of a crime of sexual violence: specifically, of an act defined in Title 9A RCW as rape in the first degree;

(2) That the respondent suffers from a mental abnormality or personality disorder; and

(3) That such mental abnormality or personality disorder makes the respondent likely to engage in predatory acts of sexual violence.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict that the respondent is a sexually violent predator.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one or more of these elements, then it will be your duty to return a verdict that the respondent is not a sexually violent predator.

[Filed March 8, 1991]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Detention of:	)	
	)	
ANDRE BRIGHAM YOUNG,	)	NO. 90-2-21319-6
	)	
	)	ORDER OF
Respondent.	)	COMMITMENT
	)	

Upon the verdict of the jury on March 8, 1991, that the respondent, Andre Brigham Young, is a sexually violent predator pursuant to RCW 71.09.060, and the verdict having been duly filed on March 8, 1991, the court hereby enters the following:

ORDER OF COMMITMENT

The respondent, Andrew [sic] Brigham Young, is hereby committed to the Special Commitment Center in Monroe, Washington, to the custody of the Department of Social and Health Services, for control, care, and treatment until such time as respondent's mental abnormality or personality disorder has so changed that respondent is safe to be at large.

DONE IN OPEN COURT this 8th day of March, 1991.

/s/Lloyd Bever
The Honorable Lloyd Bever
Judge of the Superior Court

Presented by:
/s/Tim M. Blood
TIMOTHY M. BLOOD, WSBA #14004
Attorney for Petitioner

Copy not received:

/s/Anne Engelhard
Anne E. Engelhard, WSBA #15392
Attorney for Respondent

[Filed August 30, 1993]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of ANDRE BRIGHAM YOUNG,	) NO. 57837-1)) MOTION FOR) RECONSIDERATION
Appellant/Petitioner	)

1. The appellant/petitioner Andre B. Young by and through his attorney, Robert C. Boruchowitz, moves pursuant to RAP 12.4

2. for reconsideration of the August 9, 1993, decision herein, as outlined below.

3. This motion is based on the record and file herein, and on the argument and authorities cited below.

4. Statement of Grounds for Relief and Argument

A. The Court has Overlooked Evidence In the Record Concerning Conditions In the Special Commitment Center and Misapprehended The Impact of that Evidence

The Court has written that "There is no evidence in the record addressing either the actual conditions of confinement, or the quality of treatment....Facially, the Statute and associated regulations suggest that the nature and duration of confinement is compatible with the purposes of the commitment." *Personal Restraint of Young*, 122 Wn.2d 1, 35 (1993). In fact, there is evidence in the record supporting the conclusion that the nature of the confinement is punitive.

The Trial Court In Mr. Young's Case Refused to Permit Testimony Regarding the Conditions of Confinement at SCC

The petitioners attempted to present evidence on the actual conditions of confinement and the quality of treatment, but the trial court in Mr. Young's case ruled those questions irrelevant and would not permit the testimony. The Court has overlooked the record presented in the consolidated case of *In the Detention of Cunningham*, in which the defense did present evidence about the punitive nature of the commitment facility and its staff.

In a pre-trial hearing, the judge in Mr. Young's case said that "The evidence of penalty or treatment is not directly relevant or related to the issue of whether or not respondent, under the statute, is a sexually violent predator." RPY 2/13/91 p.100.

The defense argued that their experts needed "to be able to discuss the type of facility that is involved, the kind of treatment that exists or does not exist." RPY 2/14/91 p.14. The court ruled that "...evidence of what happens in the commitment process following a finding that a person is a sexually violent predator is not an issue for proof in this proceeding." *Id.*, at 19.

In limiting the testimony of the defense expert, the judge stated: "My prior ruling was that the future treatment was irrelevant to the issues." RPY 3/1/91 at 60. He would not permit discussion of the treatment question either in a challenge to the law or before the jury.

The court prevented the defense expert Dr. Nancy Steele from testifying about her review of Mr. Young's records and her opinion about Mr. Young's possible dangerousness because it felt that such testimony would go beyond the pretrial notice. RPY 3/1/91 at 27. In the defense offer of proof, Dr. Steele testified about her knowledge of the conditions at the Special Commitment Center, based on her

discussions with the superintendent, her review of the progress notes, and her discussions with Mrs. Young. She testified that conditions at SCC "are very harsh right now and unnecessary—probably unnecessarily harsh, which increases the antagonism and the hostility between him and the staff, that they are motivated by some misguided notion *that they are there to punish him rather than to treat him.*" RPY 3/1/91 at 107 (emphasis added). No classes were established. *Id.*, at 108. She described the SCC setting as "That sounds like the worst kind of prison setting for the worst acting-out, difficult, problematic kind of inmate, which he wasn't." *Id.*, at 109.[1]

Dr. Vernon Quinsey, in a report cited by the Court, discussed the "excessive physical security and rule related security" he found at SCC, and the "inconsistent application of disciplinary rules...." *Review of the Washington State Special Commitment Center Program for Sexually Violent Predators*, (February, 1992) at 5.

Dr. Fred Wise testified that he had reviewed the chart notes from the institution, and that the "primary therapist" had made several inappropriate, unprofessional entries in the notes that were laden with value judgments and appeared unsubstantiated. RPY 3/4 152-153.

At the hearing on the defense motion for new trial, Mr. Young and his counsel raised issues about the conditions at the institution, alleging that he was not accorded the fundamental rights he had received as a prisoner in prison. RPY 4/12/91 at 25-6. The court indicated its uncertainty "whether or not there are even ground rules established at the

[1] The appellant urges the Court to reconsider also the exclusion of Dr. Steele's testimony. It became even more important because the court allowed the prosecutor to argue to the jury that the only expert who reviewed Mr. Young's records was Dr. Dreiblatt, when the prosecution knew that Dr. Steele had as well. RPY 3/5/91 at 79. RPY 3/1/91 at et.seq.

institution" but said that his court was not "the correct forum".

The Limited Testimony Permitted by Mr. Cunningham's Trial Court Demonstrated the Punitive Nature of SCC's Conditions

Mr. Cunningham first raised issues about his treatment at SCC in a pretrial hearing. He asked the court to assist him, saying that he had "no access to the legal library...." RPC 3/15/91 at 8-9. He told the judge that he had less rights at SCC than he had had in prison. Defense counsel then tried to elicit information about the conditions at SCC and the conduct of the staff through its superintendent, David Weston. The prosecutor immediately objected to such testimony as irrelevant.

The defense responded that "probably the central position of the respondent is that this statute is more punitive than it is treatment oriented....for me to develop a factual basis for that I need to develop for the Court what it looks like out there at the Special Commitment Center." RPC 3/15/91 at 19-20.

The trial court said that "some limited information can be given as to the present operation....I did not intend to spend a lot—take a lot of your time with that, simply because the statute doesn't say that the present operation of SCC as it stands is a place where the person has to go." *Id.*, at 21-22.

Mr. Weston said that he relied in part on Department of Corrections policy in developing SCC policy. *Id.*, at 22-23. The Special Commitment Center is housed within a DOC facility, the Special Offenders Center.

Mr. Weston testified that there was no grievance procedure at SCC. *Id.*, at 24. There were no written policies or procedures for making the assessment for recommendation on whether a person should be released. *Id.*, at 26.

Mr. Weston testified: "*Because we are a prison* there are security requirements for attorneys to come through." *Id.*, at 28 (emphasis added).

Defense investigator Dan Whitmore testified about the differences he observed between the SCC and the DOC Twin Rivers prison facility. *Id.*, at 31 et.seq. He noted major differences in the amount of recreation facilities. Twin Rivers had a full gym with a variety of exercise equipment, outdoor basketball courts, running track, and yard. SCC had a limited recreational facility with a pool table. The prosecutor again objected to the relevance of the testimony. *Id.*, at 33. The court initially would not permit additional testimony. *Id.*, at 34. Defense counsel made an offer of proof outlining the differences in activities and facilities available, saying: "Ultimately the SCC facilities are very bleak. The prisoners really don't have much activities and much privilege in their work, in their day-to-day lives." *Id.*, at 35.

The prosecution agreed that "there are distinctions, your Honor." *Id.*, at 35.

Mr. Whitmore testified that there is no employment at SCC, no activity areas or work benches, and no ability to go to a library, but only to order books. Once committed, a person can have access to the large yard where there is a running track. *Id.*, at 40.

Mr. Cunningham testified about the differences between the DOC facilities in which he served approximately six years and SCC. *Id.*, 41 et.seq. He did not have access to a law library at SCC, although he did in prison, "as much as you want." There was no weight room at SCC; the basketball they had was worn out. In prison he had access to exercise equipment and recreation directors. There were no classes at SCC; there were in prison, including GED, college courses, psychological training, business courses. At SCC there were no work opportunities for people not yet

committed. Those committed could earn $1.00 a day in janitorial work.

Mr. Cunningham also described the written disciplinary procedures in prison, which included the right to a hearing. At SCC, there were no written policies. Visits with ministers in prison were in private rooms. At SCC, visits were in a room with a microphone permitting the staff to listen. *Id.*, at 47. In prison, he could have fingernail clippers, Q-tips, and other cleaning items. At SCC they had to check out such items for limited time. The prison had hot water pots; SCC denied them. Mr. Cunningham was told that his calls with his attorney would be on phones in the hall. *Id.*, at 50.

Mr. Cunningham also advised the court that when he was to be taken for dental care, he was taken in shackles by DOC guards. RPC 5/8/91 at 21-23.

The WAC Regulations Do Not Provide SCC Committees a Wider Range of Privileges Than Those Provided in Prison

The Court cited WAC 275-155-050 as evidence that the committed persons enjoy "a wider range of privileges than those associated with a prison setting." 122 Wn.2d 1, at 35. This supported its conclusion that the nature of commitment under RCW 71.09 is compatible with a treatment purpose, and its conclusion that the statute is *civil*.

But the regulations the Court cites, WAC 275-155-050, simply set out minimal rights about clothes and possessions which also apply in prison. The guarantee of adequate care and treatment is a general one, and the trial court in Mr. Young's case would not permit testimony about it.

The WACs contain numerous provisions on prison inmate mail and telephone communications. For example, WAC 137-48-080 provides that "Telephone facilities shall be provided in appropriate numbers and locations to permit

reasonable and equitable access to all inmates...."This [sic] is similar to WAC 277-155-050(3)(f). WAC 137-48-060 provides for funds for postage for indigent prison inmates. This is similar to WAC 275-155-050(3)(g) which permits committed persons in SCC to send correspondence.

WAC 275-80-844 states that the "Superintendent shall...as appropriate, promptly and tentatively approve visits for the immediate family." This is similar to WAC 275-155-050 which permits SCC inmates "approved visitors within reasonable limitations."

The appellant/petitioner asks the Court to reconsider the testimony presented and the fact that the judge in Mr. Young's case would not permit testimony concerning the conditions of confinement or the quality of treatment at SCC. In fact, the testimony does not support a conclusion that the nature of commitment is compatible with the purposes of treatment. If the Court feels that the record needs additional information, Mr. Young asks that the Court permit him to supplement the record, or remand the matter to superior court for testimony on the issue. Considerable information has been gathered during the pendency of this appeal, and copies of some of it are attached. For example, the SCC has been advised by the attorney general's office that it can shoot to kill someone attempting to escape the institution. (See attached memorandum from Bill Dehmer to Andre Young February 2, 1993, and accompanying memorandum from an assistant attorney general, June 21, 1990.) The appellant asks that the Court permit the supplementation of the record with these memoranda.

B. The Court Has Misapprehended the Law on Validity of Prior Convictions and Overlooked Recent Precedent Which Requires Reversal Because of the Admission of Invalid Convictions

The Court has ruled that the trial court properly admitted evidence of four rape convictions in 1963, despite

the defense argument that the jury instructions in those cases were in error. The Court applied by analogy to sentencing under the SRA the reasoning of *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, *cert. denied*, 479 U.S. 930 (1986). The Court reasoned that a facially valid judgment and sentence can be used in a sentencing proceeding and that a civil commitment respondent would have no greater constitutional protections in this regard.

Yet the Court does not address *State v. Summers*, 120 Wn.2d 801 (1993), which the defense provided as supplemental authority. In *Summers*, this Court reversed a firearms act conviction because the underlying conviction was constitutionally invalid because of an erroneous jury instruction. The Court, relying on habitual criminal caselaw [sic], found that the defendant was seeking to "foreclose the *prior* conviction's *present* use to establish an essential element of RCW 9.41.040, *i.e.*, a constitutionally valid conviction for a 'crime of violence'." 120 Wn.2d at 810.

Similarly, Mr. Young was seeking to foreclose the use of a prior conviction to establish an essential element of the "predator" petition, namely, that he had been convicted of rape. The use of Mr. Young's 1963 convictions, both to bolster the element of a prior conviction and to support the conclusion that he is violent and likely to reoffend, is more analogous to *Summers* and its predecessor cases than it is to *Ammons*.

In *Ammons*, the defendant had been convicted and the question was not whether he should be sentenced, but what the sentence should be. The Court analogized the SRA proceeding to a parole revocation "because the individual has been convicted and the sentencing body is determining the terms and conditions of the sentence within a lawful maximum." 105 Wn.2d at 186. The Court noted that the presumptive standard sentence range, regardless of the number of prior convictions, can never exceed the statutory maximum sentence for the current offense. *Id.*, at 187.

Yet in the "predator" proceedings, the question is much more like the one in *Summers*. The jury must decide whether the respondent is a "predator" based in part on a finding of past crime. In the habitual criminal and VUFA cases, the jury also must find as an element of the offense whether the past crime occurred. The jury in a "predator" case is being asked to find beyond a reasonable doubt that various elements have been proven, including a prior conviction of rape. There is not even a question of length of commitment if the prior conviction is not proven, and if the jury is unable to find a likelihood of future dangerousness. The *Ammons* analysis applies to sentencing *after* the elements are proven beyond a reasonable doubt. The *Summers* analysis applies *before* the fact finder reaches a decision on guilt or commitment.

The Court in *Ammons* found that a preponderance of the evidence standard was sufficient to determine prior convictions. Yet in the "predator" cases, the statute requires that proof of all elements, including prior convictions, be beyond a reasonable doubt. Again, analogy to the *Summers* line of cases is more appropriate.

Finally, the Court has overlooked the fact that the present proceeding is a combined direct appeal and personal restraint petition. The *Ammons* court quotes Judge Ringold to the effect that the inmate wishing to challenge the use of a prior conviction may file a personal restraint petition. 105 Wn.2d at 188. Mr. Young did in fact file a personal restraint petition in this Court which was consolidated with his direct appeal. It would seem that effective judicial economy would permit this Court to address his challenge to the use of the unconstitutional conviction in this proceeding rather than compel additional proceedings. The jury instruction in his 1963 case had been ruled unconstitutional by the Ninth Circuit in 1958. (See app. op. br., p. 88 et. seq.)

Mr. Young asks this Court to reconsider and to apply *Summers*, *supra*, and to reverse for a new trial without the use of the 1963 unconstitutional convictions.

C. The Court Has Misapprehended the Impact of Evidence of the Bomb Threat Conviction

The Court found that while the 1972 bomb threat conviction was irrelevant, its admission was harmless. 122 Wn.2d at 54. Yet in the picture that the prosecution presented, this evidence was inflammatory and was used to support its portrait of Mr. Young as generally violent. The prosecutor argued to the jury: "The number of past violent sexual acts and arrests, not just sexually violent acts, but he relied on documents that Mr. Young has committed many other crimes as well, not all of which he has been convicted for." RPY 3/5/91 at 83.

The appellant urges the Court to reconsider its finding that the error was harmless.

CONCLUSION

The Court should grant reconsideration because the conditions at the commitment center do not support a conclusion that the effect of the law is not punitive, because applicable case law requires reversal because of the admission of unconstitutional convictions, and because the admission of an irrelevant conviction prejudiced Mr. Young's trial.

Respectfully submitted,

/s/Robert C. Boruchowitz WSBA 4563

The Defender Association
810 Third Avenue #800
Seattle, Washington 98104
206 447 3900

MEMORANDUM

February 2, 1993

TO: Andre Young

FROM: Bill Dehmer, SPP Director
Special Commitment Center

SUBJECT: RESPONSE TO SUGGESTION/ COMPLAINT

I have received and reviewed your memo dated 1/26/93. I encourage you to raise these issues with your assigned therapist. My response is listed below:

I have attached a copy of an opinion issued from the Attorney General's Office. Based on this opinion, David Weston has decided to allow access to the big/small yards only to residents who have been committed to the Special Commitment Center. This has been in effect since when we began as an agency.

c: Karen Sullivan, FT 3
Norm Nelson, FT 2
Andre Simon, PSA
Jan/Central File

OFFICE OF THE ATTORNEY GENERAL

MEMORANDUM

June 21, 1990

TO: Dave Weston, MHD, OB-42F

FROM: Jeff Freimund, AAG, QF-11

SUBJECT: Use of Deadly Force to Prevent Escapes of Civilly Committed Violent Sexual Offenders

You asked whether Department of Corrections (DOC) personnel are permitted to use deadly force to prevent the escape of a civilly committed sexual predator from the Special Offenders Center (SOC) where the new Sexual Predator Program (SPP) will be housed. Although it is a close question, the short answer is that, in my opinion, there is lawful authority for using deadly force to prevent the escape of sexual predators who have been found by a court to have committed a violent sexual offense and likely to re-offend.

There is no case law that I have been able to find that directly addresses this question. However, there is case law involving analogous situations where courts have addressed the use of deadly force against suspected dangerous felons. *See generally* Annot., 83 A.L.R. 3d 174 (1978 and Supp. 1989) (entitled "Modern Status: Right of Peace Officer to Use Deadly Force in Attempting to Arrest Fleeing Felon"). The modern rule is that where a police officer has probable cause to believe that a person has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used (1) if necessary to prevent escape and (2) if, where feasible, some warning has been given prior to using deadly force. *Tennessee v. Garner*, 471 U.S. 1, 11-12, 85 L. Ed. 2d 1, 10, 105 S. Ct. 1694

(1985). In other words, it is not unconstitutional for a police officer, after a warning, to shoot a fleeing felon who the officer has probable cause to believe committed a violent felony. In these situations, there is no requirement that a court must have first found beyond a reasonable doubt that the felon did indeed commit the violent crime, or that he is likely to re-offend. On the other hand, it is unconstitutional, in violation of the Fourth Amendment protection against unreasonable "seizures," to use deadly force to prevent escape of a suspected felon or misdemeanant who does not pose a threat of serious physical harm to either the officer or others. *Id.*

In *Garner*, the Court found that the police officer involved violated the Fourth Amendment rights of the suspect he shot and killed as the unarmed suspect was fleeing the scene of a residential burglary. At the trial the officer stated that he had shot the fifteen-year-old suspect because he believed that he would escape the scene if he did not use deadly force to prevent the escape; he had no probable cause to believe the suspect posed a danger of physical harm to others. The Court found the shooting to be in violation of the Fourth Amendment, ruling as follows:

> We conclude that such force may not be used unless [1] it is necessary to prevent the escape and [2] the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Garner, *supra*, at 3; 85 L. Ed. 2d at 4.

As noted in *Garner*, the conclusion reached in that case constitutes the common law rule on using deadly force. *Id.* at 16; 85 L. Ed. 2d at 12-13. The State of Washington is in accord with this common law rule. RCW ~~9A.~~16.040 (1986); *Reese v. Seattle*, 81 Wn.2d 374, 379-83 (1972), *cert. denied*, 414 U.S. 832 (1973).

In the context of preventing convicted felons from escaping correctional facilities, it is well established that deadly force may be used to prevent such escapes. *E.g.*, RCW 9A.16.040(1)(c)(ii-iii). This principle seems to be so firmly established that I am unable to find any recent case law seriously disputing the important governmental objectives underlying such use of deadly force.

In the situation presented here, however, the individuals housed in the Sexual Predator Program at SOC will have been civilly committed based in part on felonious conduct, rather than criminally convicted of a felony. The issue is thus whether the use of lethal force against them should be prohibited, but may be used against convicted felons housed in the same facility. As indicated above, my answer is no. The civilly-committed sexual predators will have been found beyond a reasonable doubt to have committed a violent felony, just like many of the convicted felons housed in the facility (although some of those convicted felons may not have committed *violent* felonies). Unlike convicted felons, the civilly-committed sexual predators will *also* have been found beyond a reasonable doubt to present a likelihood of committing similar violent acts. Consequently, a strong argument can be made that the public policy underlying the use of deadly force, which is essentially to prevent the imminent threat of serious harm to others, is more compelling in the situation of a civilly-committed sexual predator who has been determined likely to harm again than in the situation of a convicted felon who has not been so determined and who may or may not have committed a *violent* felony. In at least two cases I am aware of that involved civilly-committed, violent sexual offenders housed in state prisons where perimeter security is provided by armed correctional officers, the courts did not find that the potential for use of deadly force to prevent escapes was unconstitutional, although that issue was not before the courts nor directly addressed. *See Allen v. Illinois*, 478 U.S. 364, 92 L. Ed. 2d 296, 106 S. Ct. 2988 (1986); *Doe v. Gaughan*, 808

F.2d 871 (1st Cir. 1988); attached memo to me from Law Clerk Carol Murphy. For these reasons, I believe that a policy substantially similar to DOC's existing Policy No. 420.200 (governing the use of firearms) would withstand constitutional challenge in our courts even if applied to civilly-committed sexual predators.

A closer question is presented by whether deadly force is justified against alleged sexual predators committed to SOC for 45-day evaluations upon a finding of probable cause by a court that the individuals may be sexual predators. Unlike those individuals indefinitely committed following a judicial finding beyond a reasonable doubt that the individuals are sexual predators and are likely to re-offend, there has only been probable cause findings at this point for those individuals committed for 45-day evaluations. Thus, the threat to society presented by an escape of such individuals is not as firmly established as is the case for those found beyond a reasonable doubt to present such a threat.

Nonetheless, as discussed above, the use of deadly force is justified when a police officer, on his own, has probable cause to believe a person presents a likelihood of serious harm to others if permitted to escape from the scene of a felony. Therefore, the Constitution does not require that a court must find beyond a reasonable doubt that a person presents a threat of serious harm to others before deadly force may be justified. A probable cause belief may suffice in some limited circumstances.

However, given the close nature of the question presented here, my suggestion would be that individuals committed to the SPP program for 45-day evaluations should be segregated from other SPP residents in a manner that virtually eliminates the opportunity of escape. In short, some thought should be given to limiting, if not eliminating, the opportunity for outside yard exercise for those residents housed at SPP for up to 45 days for evaluations. This procedure would avoid the problem of potentially having to

adopt separate use of force policies for indefinitely committed individuals and for individuals committed for up to 45 days. Of course, exercise opportunities should be given to all SPP residents, but access to the outside yard may have to be limited for those committed to the SPP for up to 45 days.

In summary, it is my opinion that a policy authorizing the use of deadly force to prevent the escape of indefinitely committed sexual predators is permissible. Use of deadly force may also be permissible to prevent the escape of individuals committed for up to 45 days for evaluations upon a finding of probable cause that the individuals are sexual predators. However, since this latter situation is a closer question than the former, I would suggest alternative means be explored to prevent escape without creating the potential need for deadly force.

Additionally, one final suggestion is that some thought should be given to seeking amendment of RCW 9A.16.040 to expressly include authority to prevent the escape of sexual predators from the SPP program. The statute currently provides, in pertinent part, that: "[h]omicide or the use of deadly force is justifiable . . . [t]o prevent the escape of *a person* from a federal or state correctional facility or in retaking a person who escapes from such a facility . . . ." RCW 9A.16.040(1)(c)(ii) (emphasis added). Arguably, a civilly-committed sexual predator who escapes from a correctional facility is "a person" within the meaning of this section just as would be a civilly-committed person transferred to SOC under RCW 72.68.032 and .035. However, to make the statute completely unambiguous as applied to such individuals, I suggest that after the word "person" a phrase be added, "including civilly-committed sexual predators."

I hope this information is of help to you. If I can be of further assistance, please do not hesitate to contact me. This memorandum contains my opinion only, and cannot be

construed as an official opinion of the Attorney General's Office.

JF/smw

[Filed March 11, 1994]

3/11/94

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Detention of	) No. 90-2-21319-6
	)
ANDRE BRIGHAM YOUNG,	) FINDINGS OF FACT AND
	) CONCLUSIONS OF LAW
Respondent.	) ON RESPONDENT'S
	) MOTION TO DISMISS
	) BASED ON
	) UNCONSTITUTIONAL
	) CONDITIONS OF
	) CONFINEMENT AT SCC

This matter came before the undersigned judge for an evidentiary hearing on Respondent's motion to dismiss this action because of the alleged unconstitutional application of RCW 71.09 to the respondent by virtue of (1) the actual conditions of confinement of and 2) the nature and quality of treatment available to the Respondent at the Special Commitment Center. The evidentiary hearing on Respondent's motion took place from November 16 through December 15, 1993, during pre-trial proceedings in this case prior to the commencement of trial on remand from the Washington Supreme Court on the issue of least restrictive alternative on March 28, 1994.

The State of Washington appeared through Prosecuting Attorney Norm Maleng, represented by Timothy M. Blood. The Respondent appeared in person and through his attorneys of record, Robert Boruchowitz and Jennifer Shaw. The court heard the testimony of numerous witnesses, reviewed exhibits admitted into evidence, legal briefs and memoranda submitted by the parties, and considered the parties' oral arguments on February 3, 1994, and made the following:

FINDINGS OF FACT

1. Adjudged sexually violent predators (SVPs) like the Respondent, and individuals subject to pending petitions for civil commitment pursuant to RCW 71.09, reside in the Special Commitment Center (SCC), which is operated by the Department of Social and Health Services (DSHS) and housed wholly within a Department of Corrections (DOC) prison facility.

2. The SCC is a unit physically located within the DOC Special Offender Center (SOC) building in Monroe, Washington. The SOC building also separately houses, in one unit, mentally ill prisoners undergoing temporary treatment and stabilization and, in another unit, developmentally disabled prisoners. The average length of stay for prison inmates in the SOC is approximately six (6) months.

3. The physical layout for the SCC was designed for SOC prison use prior to the existence of the SCC. The SCC is operated by DSHS with DOC by written interagency agreement. Sharing a physical facility with the DOC under the terms of the interagency agreement requires SCC compliance with a number of DOC prison rules and regulations, some contact between SCC residents and DOC inmates, and dependence of the SCC on DOC for many necessary services to the operation of the SCC, including but not limited to shared use of the SOC law library and visiting rooms, DOC medical services, and use of DOC meal services. SCC residents' lives, like DOC inmates' lives, are affected by the SOC facility design, services and administrative policies.

4. The SCC uses resident monitoring equipment (for example, video and audio monitoring in all program rooms and audio monitoring in all resident rooms) which was installed in the facility by DOC for DOC use in a prison facility. SCC residents are frequently and may at any time be

monitored by SCC staff through use of such equipment, without the resident's knowledge.

5. Space limitations and some elements of the SOC facility design at the SCC are more restrictive for residents than for prison inmates in general DOC facilities which are not specifically designed for mentally ill offenders. Respondent has more restrictions on his freedom of movement in the SCC facility than he had during 17 years of custody with the DOC. The SCC unit is smaller than many DOC prison units.

6. The SCC is rated medium to close in terms of the facility's external (perimeter) security. SCC's internal security is provided by DSHS with back-up emergency services from DOC. SCC has called DOC staff for a "show of force" against SVP residents at least a half dozen times. SCC's entry security as well as its perimeter security is provided for by DOC. SCC residents, like DOC inmates, who may attempt to escape from a yard facility may be shot by DOC guards pursuant to a legal opinion provided by the Washington State Attorney General. SCC residents who have not yet been committed are not permitted to use the large yard.

6A. There is no resident security classification system at the SCC for the evaluation of the individual security needs and requirements for each resident, and there is no system in place for separating high risk residents from low risk residents. Such individual security classification systems are in place in most prison facilities.

7. Each SCC resident has his own personal sleeping and bathroom space, while most DOC inmates share such spaces with other inmates.

8. Space limitations and facility design at the SCC require both pre-commitment and post-commitment detainees to be housed together, despite recommendations by all treatment experts who testified in this hearing (and also

Dr. Quinsey in his written evaluation) that segregating these two groups of residents would further the treatment goals of the program.

9. Space limitations and facility design at the SCC require both residents undergoing treatment as well as those choosing not to participate in treatment to be housed together, despite recommendations by all treatment experts who testified in this hearing (and also Dr. Quinsey in his written evaluation) that segregating these two groups of residents would significantly further the treatment goals of the program.

10. DOC inmates in general are subjected to strip searches under broader circumstances than SVPs at the SCC. SCC residents like DOC inmates have been strip searched on a regular basis without reasonable suspicion after trips outside the SCC facility, even though residents have been under constant armed surveillance while gone. No contraband or weapons have been found in any strip searches of SCC residents since the opening of the SCC facility.

SVPs are subjected to room searches and recording of their telephone calls, only upon reasonable suspicion that the search is warranted in the interests of the health, safety, or security of SCC residents, staff or others. In contrast to SVPs, the majority of DOC inmates are also subjected to regular room searches and recording of their telephone calls, without reasonable suspicion.

11. Respondent was subjected to routine strip searches at the SCC both before and after every family visit, both before and after his commitment, and without reasonable suspicion, until this strip search policy was modified to require only routine patdown searches before and after family visits. Respondent was not permitted to hold hands with his wife during family visits in the SOC; he was not subject to such a restriction when he was in DOC prisons.

11A. When SCC residents are taken to a medical appointment out of the building, they are dressed in DOC overalls, they are taken in handcuffs and shackles, and they are strip searched when they return.

12. Strip searches of Respondent and other SCC residents were conducted by SCC forensic therapists and other unit staff, even though it is undisputed that use of residents' respective therapists to conduct such strip searches is incompatible with the treatment goals of the program because such practices can be harmful to establishing and maintaining a therapeutic relationship based on trust. The practice of including an individual resident's assigned therapist in strip searches of that resident was terminated on December 6, 1993, when the SCC Superintendent first learned, as a result of testimony in this hearing, that such a practice is inconsistent with the treatment goals of the program.

13. Formal grievance procedures are in place at all DOC facilities, which include but are not limited to providing prisoners with notice and definitions of infractionable offenses and the consequences for violations thereof, and the opportunity for a prompt hearing on any alleged infraction. The SCC has no such formal grievance procedures for its residents. As a result, there is the potential for arbitrary and inconsistent enforcement of rules on the unit.

14. SCC written policy dated August 6, 1991, provides that residents may be denied the right of worship, depending on their treatment plan. There was no testimony provided by treatment experts about whether or not denial or restrictions of a resident's freedom of worship would ever advance any individual's treatment plan at the SCC. SCC has made a professional judgment that it could be appropriate to deny or restrict a resident's freedom of worship if it conflicts with an individual's treatment plan.

15. Inmates in the DOC Twin Rivers treatment program for sex offenders and in some other DOC programs

have access to private trailer visits with their spouses and other family members. There has been no policy in place at the SCC since its commencement in 1990 defining the circumstances under which a resident may become eligible for such conjugal visits as part of his individual treatment program, despite the testimony of treatment experts (including consultants to the SCC as well as independent experts) that such conjugal and family visits may significantly enhance an individual sex offender's treatment program. Conjugal and extended family visits have not been permitted at SCC.

16. No transition, work-release, or aftercare program has been designed or implemented at the SCC, despite the expert opinion of SCC consultant Dr. Vernon Quinsey in 1992 that "the lack of any provision for aftercare and community supervision" is "a fatal problem with the special commitment program as it now stands." All treatment experts (including consultants to the SCC as well as independent experts) agreed that gradually reduced supervision of and well-defined conditions of eligibility for release from detention and an aftercare program for SVPs are fundamental and necessary component to any treatment program for this population.

17. The regulations for the SCC in WAC 275-155-050 do not, as a whole, provide a wider range of privileges for residents at the SCC than those to which DOC prison inmates are entitled, either in policy or practice. Access for a limited number of the SVPs in the SCC to personal use of a microwave, refrigerator, video games, and personal purchases of pizzas and other grocery items outside the facility for consumption at the SCC do not, in and of themselves, sufficiently distinguish the privileges available to residents at the SCC from those available to prison inmates. In many respects, the privileges and opportunities for residents at the SCC are less than those to which residents were entitled in DOC prison facilities (for example, law

library access, limitations on visiting hours, recreational opportunities).

18. The cognitive-behavioral treatment program designed for adjudged SVPs at the SCC has five components: (1) assessment and evaluation; (2) psychotherapy (group and individual); (3) psycho-educational modules; (4) assessment and modification of sexual arousal; and (5) a treatment milieu intended to encompass all aspects of the resident's environment in the facility.

19. The SCC treatment program design was created in consultation with a number of treatment experts, including those experienced in the treatment of prisoners who are subject to determinate sentences in prison facilities (specifically, the Twin Rivers program in the DOC and the Atascadero corrections program in California) as well as those experienced in the treatment of sex offenders who qualify for supervised outpatient treatment in the community.

20. None of the experts consulted by DSHS in the design of its treatment program at SCC had experience in either the design or actual treatment of adjudged SVPs subject to civil commitment of indeterminate duration in secure facilities like the SCC.

21. While some key elements of the treatment programs designed and in effect in both the DOC Twin Rivers prison facility and the Atascadero prison in California (used as a model for the SCC) are not included in the design of the SCC treatment program (for example, core relapse prevention groups led by either a clinical psychologist or psychiatric social worker, use of highly structured treatment manuals for all components of treatment, required attendance in therapy groups and psychosocial modules, significant employment opportunities, couples and family therapy, 12-step groups, mandatory pre-release classes and aftercare programs), DSHS has exercised professional judgment in the design of the SCC program.

22. While all five components of the SCC treatment program design are theoretically in place and available to residents, none of the five components of the SCC treatment program design has been fully implemented or is fully functioning at this time. For example, the only group therapy which has occurred took place for approximately one year or less (1992-1993), met for a maximum of three (3) hours per week, involved 5 residents at the most, was led by one forensic therapist who was not a psychiatrist, psychologist, psychiatric social worker or registered nurse, and was cancelled by staff because of the inability of the leader to manage the dynamics of the group. There has been a request for other therapy groups, but none had been started as of November 17, 1993. The consensus of all mental health experts testifying is that intensive group therapy is the most critical component of successful sex offender treatment programs, and group therapy is asserted by SCC staff to be the primary treatment modality at the SCC.

22A. SCC staff attribute the incomplete implementation of the treatment program design to most residents' choice not to participate in some or all of the program, for a variety of reasons cited by residents which include but are not limited to the following: lack of confidentiality in all individual and group therapy (evidence of all such participation can and must be provided to the court, notwithstanding WAC 275-155 which provided for residents' right to remain silent until 1993), lack of interest in various aspects of the treatment program, lack of confidence in treatment staff experience and skills, advice of legal counsel, infrequency and unavailability of psychosocial educational modules and therapy groups, lack of incentives and hope because of a perceived absence of a relationship between participation in treatment and release from commitment, absence of an aftercare or transition program for release to the community, staff inconsistency in applying

criteria for participation in various aspects of the treatment program, and resistance to treatment.

22B. All SCC staff believe that the fundamental reason that most committed SVPs are not engaged in aspects of treatment is because they all believe that it would disadvantage them from a legal perspective in their quest for release. This belief on the part of staff has played a role in the incomplete implementation of the treatment program design. Other reasons which have contributed to incomplete implementation of the treatment program by DSHS also include but are not limited to the small size of start-up program, limited resources, limited number of treatment staff qualified to teach certain psychosocial educational modules, staff inexperience in leading group therapy, staff deference to initiation of treatment by committed residents, and competing administrative demands on professional staff.

22C. While there are presently more treatment opportunities and programs in place for convicted sex offenders in the DOC Twin Rivers prison facility than there are in the DSHS facility at SCC for civilly committed SVPs, there are adequate and limited opportunities for residents to participate in sex offender treatment at the SCC.

23. Opportunities for resident employment, structured leisure activities, and education are less at the SCC than at either the DOC Twin Rivers facility or the Atascadero prison facility, whose prison treatment programs were the models for the design of the SCC treatment program. Such opportunities have not been shown to be less than those available in other DOC prison facilities. DSHS staff indicated that the small size of the SCC as a "start-up" program, budgetary constraints, and space limitations in the existing facility have been administrative constraints on establishing such programs and opportunities for residents who are civilly committed to the SCC for an indeterminate term.

24. There is no formal grievance procedure at the SCC comparable to that in place at all DOC prison facilities, which procedures define specific behavior for which residents may be subject to discipline, and the specific consequences to be applied uniformly to such violations. While DSHS staff has exercised professional judgment in its determination that having such rules and regulations and grievance procedures are at odds with the treatment goals of the SCC, the absence of the same has contributed to staff discipline of residents which is at times arbitrary and inconsistent.

25. The staff at the SCC who are directly and indirectly involved in the treatment of SVPs does not include any state-certified (pursuant to SSOSA, the Special Sex Offender Sentencing Alternative) sex offender treatment providers. The only staff person who has sufficient professional experience to be so qualified is the Superintendent, who is not directly involved in providing any treatment to SVPs, whose office is in a trailer outside the SCC residence, and who rarely spends any time on the unit. There is a part-time psychiatrist available to prescribe medications for a few residents and who is not otherwise engaged in treatment of residents. There is one psychologist on staff, who was unlicensed and had no experience working with sex offenders when she was initially hired at the SCC, and subsequently became licensed approximately one year later. The psychologist spends approximately 70 percent of her time preparing evaluations of pre- and post-commitment residents for court proceedings; she is not directly engaged in conducting group or individual therapy to committed residents.

26. The staff most directly involved in the treatment milieu and management of the SVPs are employees classified as forensic therapists and psychiatric security attendants, whose relevant work experience prior to employment at the SCC consists primarily of work in DOC

prison institutions. All staff have received training in aspects of the treatment program designed for SVPs since their employment at the SCC. While the forensic therapists who have primary responsibility for providing individual therapy to residents and are expected to conduct group therapy when it occurs are not psychologists, psychiatrists, psychiatric social workers or registered nurses, they receive some supervision from and have been trained by qualified psychologists who are consultants with the SCC. There is no treatment manual to define the structure and management of group or individual therapy, even though most staff expected to provide direct treatment to residents are not psychologists, psychiatrists, psychiatric social workers or registered nurses. The treatment responsibilities of the PSAs are not clearly delineated.

27. Respondent's assigned therapist, Norm Nelson, who has a job classification of forensic therapist 2 is not a psychologist, a psychiatric social worker, or a registered nurse.

28. SCC have verbally abused residents, including the Respondent, on a number of occasions by deriding both their status ("rapo," "pervert" and "fucking punk") and their race ("niggers," "nigger lawyer," "sand niggers," "sand monkeys"). On one occasion, a psychiatric security attendant (PSA) mimicked a Native American dance in front of a Native American resident. Such derogatory and racist comments and behavior are inconsistent with the treatment purpose of civil commitment at the SCC.

29. There is a "level" system in place at the SCC which provides for tier assignments of residents on the unit and for restricted access of some residents to the microwave, refrigerator, silos, weight room and pool table. It is possible that residents could be placed on diferent [sic] levels for the same behavior. There is no treatment rationale for the current level system.

30. Respondent has been brought to and from court for this hearing in handcuffs, accompanied by one or two armed King County Jail officers. He is held in the King County Jail overnight during court hearings. There is no segregation of SCC detainees from jail inmates in the King County Jail.

Based on the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

1. The Respondent has a due process right to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. The Respondent has a due process right to treatment for the mental health condition for which he has been involuntarily committed by the State.

1A. The burden of proof for purposes of this motion is on the Respondent to prove beyond a reasonable doubt that the actual conditions of his confinement and the actual nature and quality of treatment available to him at the SCC pursuant to RCW 71.09 violate his substantive due process rights.

2. Notwithstanding the liberty interests of the Respondent at issue, the State does not have the burden of proving that the actual conditions of his confinement and the nature and quality of treatment available to him at the SCC either bears some reasonable relationship to the civil purposes of the statute (incapacitation and treatment) or that the Respondent is being afforded more considerate treatment and conditions of confinement at the SCC than criminals whose conditions of confinement are designed to punish.

3. This court cannot consider whether the actual conditions of Respondent's confinement pursuant to RCW 71.09 manifest a criminal purpose to this statutory scheme which has been held to be civil in purpose and facially valid

by the Washington Supreme Court [*In re Young*, 122 Wn.2d 1 (1993)].

4. RCW 71.09.060 authorizes Respondent's detention in a facility within the following parameters: (1) a secure facility for control, care, and treatment operated by the department of social and health services; (2) the facility shall not be located on the grounds of any state mental facility or regional habilitation center because such institutions are insufficiently secure for this population; and (3) confinement may be in a mental health facility located wholly within a correctional institution pursuant to RCW 10.77.220.

5. Because the approved statutory scheme authorizes detention of Respondent in a secure mental health facility located wholly within a correctional institution, the Respondent has been unable to sustain his burden of proving beyond a reasonable doubt that his detention in the SCC facility, which is both physically located within and physically designed for a Department of Corrections prison facility, violates his substantive due process rights.

6. Because compliance with DOC rules and regulations is implicit in the approved statutory scheme authorizing detention of the Respondent in the SCC located within and designed for a DOC prison facility, the Respondent has been unable to sustain his burden of proving beyond a reasonable doubt that the application of many DOC institutional rules, regulations and restrictions to the SCC facility (either pursuant to the DOC/SCC joint operating agreement or SCC administrative decisions) violates his substantive due process rights.

7. Notwithstanding the Respondent's proof by a preponderance of the evidence that some of the DSHS administrative policies and/or practices in effect at the SCC facility are or have been incompatible with the treatment purposes of the Respondent's civil commitment (for example, the strip searches of a resident by his assigned therapist), the Respondent has failed to prove beyond a

reasonable doubt that the DSHS administrative policies and practices, as a whole, which are in effect at the SCC violate his substantive due process rights.

8. Notwithstanding the Respondent's proof by a preponderance of the evidence that some of the DSHS administrative policies and/or practices in effect at the SCC facility have not afforded the Respondent more considerate treatment and conditions of confinement than those in effect for DOC prison inmates (for example, the absence of procedural due process for alleged violations of SCC residential rules and regulations), the Respondent has failed to prove beyond a reasonable doubt that the DSHS administrative policies and practices, as a whole, which are in effect at the SCC violate his substantive due process rights.

9. Development and implementation of a structured, well-defined SCC program for transition, work-release and aftercare for committed residents is not prohibited by RCW 71.09. The absence of a transition, work-release, and aftercare program by the SCC for an individual in treatment at the SCC is incompatible with the treatment goals of the program and is a substantial departure from accepted professional judgment and practice.

10. DSHS has exercised reasonable professional judgment in the design of the cognitive-behavioral treatment program for SVPs who are subject to civil commitment of indeterminate duration in secure facilities pursuant to RCW 71.09 at the SCC.

11. Given the presumption of correctness of all decisions of DSHS regarding the SCC treatment program design and implementation, coupled with the Respondent's burden of proving beyond a reasonable doubt that the treatment program, as a whole, both by design and in practice (1) is incompatible with the treatment goals of the program and (2) does not constitute an exercise of reasonable

professional judgment by DSHS, the Respondent's motion to dismiss must be denied.

DATED this 11th day of March, 1994.

/s/Harriett M. Cody
JUDGE HARRIETT M. CODY

Approved as to form only:

/s/Tim M. Blood
TIMOTHY M. BLOOD, WSBA #14004
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner State of Washington

Approved as to form:

/s/Robert C. Boruchowitz
JENNIFER SHAW, WSBA #17308
ROBERT BORUCHOWITZ WSBA #4563
Attorney for Respondent Andre Brigham Young

[Filed June 6, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY,	)	NO. C91-664WD
	)	
Plaintiff,	)	ORDER AND
v.	)	INJUNCTION
	)	
DAVID B. WESTON, et al.,	)	
	)	
Defendants.	)	

The plaintiff has moved for injunctive relief based on the jury's finding that defendants Weston and Dehmer deprived him of his constitutional right of access to mental health treatment. All materials filed in support of or opposition to the motion, and the evidence received at trial, have been fully considered.

Plaintiff Richard Turay is confined as a "sexually violent predator" by the State of Washington pursuant to RCW ch. 71.09, a civil commitment statute. Plaintiff alleges in this lawsuit that the conditions of his confinement at the Special Commitment Center ("SCC") at Monroe, Washington, have violated his civil rights. He contends that his rights have been violated by overly restrictive policies regarding security, physical movement, visitation, and mail; by the defendants' failure to provide him with adequate mental health treatment and with educational, vocational, exercise, and recreational opportunities; and by certain defendants having subjected him to an unlawful probe search.

The defendants are David Weston, superintendent of the SCC; William Dehmer, program director; Norman Nelson, forensic therapist; John Anderson-Taylor, forensic

therapist; Steven Wahl, psychiatric security attendant; Andre Simon, psychiatric security attendant; and Joan Kirchoff, former forensic therapist.

Plaintiff has not challenged in this case the constitutionality of RCW ch. 71.09, nor the legality of his confinement; the suit relates only to conditions of confinement.

This case was tried to a jury March 16-28, 1994. On March 28, the jury returned its verdict finding that defendants Weston and Dehmer had denied plaintiff access to constitutionally adequate mental health treatment. On two claims relating to visitation the jury was unable to reach agreement; these were submitted to the court by stipulation, and the court found for the defendants. The jury also was unable to agree on the probe search claim, which will be retried to a different jury. In the March 28 verdict, the jury found for the defendants on all other claims.

The Fourteenth Amendment Due Process Clause of the United States Constitution requires state officials to provide a civilly-committed person, such as the plaintiff, with access to mental health treatment which gives him a realistic opportunity to be cured or to improve the mental condition for which he was confined. *See Youngberg v. Romeo*, 457 U.S. 307, 319-22 (1982); *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980). Continued confinement without access to mental health treatment, as required by the Constitution, would result in irreparable harm to the plaintiff. Given the verdict of the jury, and the findings set out below, the plaintiff is entitled to injunctive relief narrowly tailored to remedy this constitutional violation.

With respect to the provision of mental health treatment, the evidence submitted at trial established, and the court finds as facts, the following:

1. The jury's finding that defendants Weston and Dehmer have failed to provide plaintiff with access to mental

health treatment which gives him a reasonable opportunity to be cured, or to improve, is adopted for purposes of this order and injunction.

2. "Sexually violent predators", as defined by RCW 71.09.020, are a difficult population to treat therapeutically, requiring specialized treatment expertise and modalities.

3. A person civilly-committed under Washington's sexually violent predators law, RCW ch. 71.09, will not be released from secure confinement until a determination is made that his mental abnormality or personality disorder has so changed that he is not likely to commit predatory acts of sexual violence if released. RCW 71.09.090.

4. For the most part, treatment staff at SCC are inexperienced in the treatment of sex offenders.

5. The training of staff in this area has been developed ad hoc, and has consisted mostly of lectures.

6. Until recently, no clinical psychologist or psychiatrist was regularly available to the treatment staff for consultation or supervision of therapy programs.

7. Treatment plans with objective measures of progress have not been developed for individuals confined in the program. As a result, it is difficult for either the resident or the staff to know if the individual is improving and in what ways.

8. Trust is an important element in a therapeutic relationship, yet trust and rapport between therapy staff and persons confined at SCC has remained very low, partly because of deficiencies in the program.

9. Treatment staff have verbally abused residents and have performed strip searches of residents.

10. The failure of the program to meet constitutional standards to date has contributed to a belief by residents that they have no chance of ever qualifying for release, i.e., that their confinement amounts to a life sentence.

Based on the foregoing, the defendants Weston and Dehmer, in their official capacities, are hereby enjoined as follows:

A. To adopt and implement a plan for initial and ongoing training and/or hiring of competent sex offender therapists at SCC.

B. To implement strategies to rectify the lack of trust and rapport between residents and treatment-providers.

C. To implement a treatment program for residents which includes all therapy components recognized as necessary by prevailing professional standards in comparable programs where participation is coerced. As agreed to by defendants, this shall include the involvement of spouses and family members in the treatment of residents, and plans for encouraging the visitation and support of family members.

D. To develop and maintain individual treatment plans for residents that include objective benchmarks of improvement so as to document, measure, and guide an individual's progress in therapy.

E. To provide a psychologist or psychiatrist expert in the diagnosis and treatment of sex offenders to supervise the clinical work of treatment staff, including monitoring of the treatment plans of individual residents, and to consult with staff regarding specific issues or concerns about therapy which may arise.

Defendant Weston shall file and serve on plaintiff and his counsel by July 20, 1994, a report describing the steps taken to satisfy the terms of this injunction. Plaintiff's counsel may submit any objections to the report no later than

July 27, 1994. After court review of the report and objections, if any, a further order will be issued.

The clerk is directed to send copies of this order to all counsel of record.

Dated: June 3, 1994.

/s/William L. Dwyer
William L. Dwyer
United States District Judge

Hon. Magistrate Judge Philip K. Sweigert

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON

ANDRE BRIGHAM YOUNG, Petitioner, vs. DAVID WESTON, Superintendent of the Special Commitment Center, and STATE OF WASHINGTON, Respondents	) No. C 94-480C) AMENDED PETITION) FOR WRIT OF HABEAS) CORPUS)) (28 U.S.C. Sec. 2254)

ANDRE BRIGHAM YOUNG, the petitioner herein, is confined at the Special Commitment Center, a maximum security facility staffed by the Department of Social and Health Services of the State of Washington and located within a prison building operated by the Department of Corrections of the State of Washington in Monroe, Washington. He seeks a writ of habeas corpus.

1. Name and Location of Court which entered the judgment of conviction under attack.

King County Superior Court, Seattle, Washington 98104; Supreme Court of Washington, Temple of Justice, Olympia, Washington 98504.

2. Date of judgment: March 8, 1991; August 9, 1993, Washington Supreme Court opinion.

3. Length of incarceration: indefinite.

4. Nature of offense involved: Petition for involuntary commitment under RCW 71.09 (commitment of persons as "sexually violent predator").

5. What was your plea? Mr. Young denied the accusations against him. There is no formal plea process under RCW 71.09.

6. Type of trial: Jury.

7. Did you testify at the trial? No.

8. Did you appeal from the judgment? Yes

9. a. Name of Appellate Court: Washington Supreme Court.

b. Result: Washington Supreme Court found several constitutional violations in the trial, one harmless error in admission of evidence, and remanded for trial on the question of whether a less restrictive alternative is appropriate.

c. Date and citation: August 9, 1993, *In re Young*, 122 Wash.2d. 1 (1993).

d. Grounds raised: The petitioner raised approximately 30 constitutional and evidentiary issues, including substantive and procedural due process violations, double jeopardy violations, equal protection violations, and *ex post facto* violations.

e. and f. Higher state court or United States Supreme Court: The Washington Supreme Court is the highest state court. The petitioner has not sought certiorari in the United States Supreme Court.

10 & 11: Other than a direct appeal from the judgment, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

The petitioner filed a personal restraint petition in the Washington Supreme Court before trial in state court; the Court accepted the petition and consolidated it with the petitioner's direct appeal. The petitioner, *pro se*, sought habeas corpus relief in the United States District Court for the Western District of Washington during the pendency of the state court proceedings, challenging the constitutionality

of the proceeding. The petition was dismissed without prejudice for failure to exhaust state remedies.

12. State concisely every ground on which you claim that you are being held unlawfully.

The petitioner has been committed indefinitely to a maximum security facility within a prison, based on a finding that he is "likely to engage in predatory acts of sexual violence" based on a combination of a "mental abnormality" and a "personality disorder not otherwise specified." He was denied basic substantive and procedural due process rights required by constitutional due process provisions and equal protection rights accorded to persons in traditional civil commitment proceedings. In addition, he was subjected to additional punishment for the offense on which he had completed serving a prison sentence, thereby violating both double jeopardy and *ex post facto* protections.

A. Indeterminate commitment under RCW 71.09 amounts to unconstitutional preventive detention. It violates Fourteenth Amendment substantive due process rights by committing for "treatment" persons who are not mentally ill and who have committed no criminal act since their imprisonment.

B. The statute violates Fourteenth Amendment substantive due process requirements because the state has not eschewed all interest in punishment and a petition for commitment under RCW 71.09.030(1) cannot be instituted until the sentence of a respondent is about to expire or has expired.

C. The Statute violates Fourteenth Amendment procedural due process because it does not require constitutionally adequate evidence of dangerousness and because it does not require the recent commission of a sexual crime or any other behavior or act that shows some objective measure of dangerousness before someone can be committed as a "sexually violent predator".

D. The decision of the Washington Supreme Court in *In re Young*, 122 Wash. 2d 1 (1993) compounds the problems of the statute and violates Fourteenth Amendment equal protection rights as it requires the proof of a recent overt act for cases involving respondents who have been released from prison but not for those who still are in prison.

E. RCW 71.09 violates Fourteenth Amendment equal protection rights because the procedures and standards used to commit prisoners as "sexually violent predators" are not substantially equivalent to those provided mentally disordered citizens whose commitment is sought under other statutes, specifically RCW 71.05. In addition to not requiring a recent overt act, there is no right to remain silent in RCW 71.09 as there is in RCW 71.05.

F. The Statute is vague and violates Fourteenth Amendment procedural due process because it fails to provide constitutionally adequate guidance to mental health evaluators and fact-finders for determining whether someone is a "sexually violent predator".

G. The statute violates Fourteenth Amendment procedural due process because it requires that the state prove only that an accused is "likely to engage in predatory acts of sexual violence" if released; this does not constitute a true "beyond a reasonable doubt" standard.

H. The application of the Statute in Mr. Young's case violated his Fourteenth Amendment and Fifth Amendment right against self-incrimination because the Court allowed his uncounseled statements and his silence to be used as evidence to obtain an indeterminate commitment.

I. The Statute violates the prohibition in U.S. Const. Art. I, Sec. 10 against *ex post facto* laws because it retrospectively subjects an individual to indeterminate commitment for criminal acts committed prior to the Statute's enactment.

J. The Statute violates the prohibition against double jeopardy in U.S. Const. Fifth and Fourteenth Amendments because it subjects an individual to additional punishment for a crime after he has completed his prison sentence imposed by a judge.

K. The trial court violated Mr. Young's Fourteenth Amendment due process right to a fair trial by permitting the state's proferred [sic] expert testimony by a psychologist that Mr. Young suffered from a mental abnormality that made him likely to engage in predatory acts of sexual violence. The psychologist also testified as to his opinion on the ultimate issue before the jury, that Mr. Young was a "sexually violent predator". The opinion of the witness as to a matter of law was beyond his competence. His testimony was unreliable, and scientifically invalid, as it was not based on personal observation or interview and constituted the application of a new psychological theory not recognized in scientific literature. The state offerred [sic] no evidence of any consensus in the scientific community supporting that theory, and the defense showed that the consensus of the scientific community does not support the theory. This testimony rendered the trial fundamentally unfair.

L. Mr. Young was denied his Sixth Amendment right to confrontation and his Fourteenth Amendment due process right to a fair trial when the state's expert was allowed to relate hearsay opinions and conclusions that were contained in the historical records he reviewed.

M. The Washington Supreme Court committed constitutional error in finding that it was harmless error for the trial court to allow the state to present evidence of Mr. Young's 1972 misdemeanor bomb threat conviction. The introduction of that irrelevant and prejudicial evidence denied him his Fourteenth Amendment due process right to a fair trial.

N. The trial court committed constitutional error in admitting evidence of Mr. Young's 1963 Pierce County convictions because the jury instructions which led to those convictions erroneously defined the presumption of innocence (using an instruction ruled invalid by the Ninth Circuit years earlier), impermissibly commented on the evidence, and shifted the burden of proof to Mr. Young on the issue of alibi. These were violations of the Fourteenth Amendment due process right to a fair trial.

O. It was constitutional error to give the 1963 reasonable doubt and presumption of innocence instruction to the 1991 jury, because those instructions were unlawful and because the 1991 jury received a separate instruction on reasonable doubt and none on presumption of innocence. These were violations of the Fourteenth Amendment due process right to a fair trial.

P. Because the state cross-examined a defense witness about knowledge concerning the "fact" that Mr. Young had lost all of his appeals, the trial court denied Mr. Young his Fourteenth Amendment due process right to a fair trial in precluding defense evidence that Mr. Young's challenge to his 1963 convictions was still on appeal.

Q. When the defense moved for discovery of any prior criminal record of all state's witnesses, and the defense investigator asked the two police witnesses if they had been charged with a crime or any misconduct, and they answered negatively, and the state disclosed nothing concerning misconduct or criminal behavior, and after the police testified a reporter advised the defense that both officers had been demoted during their career for alleged misconduct and one had been convicted of a crime, the trial court denied Mr. Young his Fourteenth Amendment due process right to a fair trial when it prevented the defense from presenting the evidence of the misconduct and criminal behavior.

R. The court denied Mr. Young his Fourteenth Amendment due process right to a fair trial by admitting the

1963 convictions because they were more prejudicial than probative.

S. The court denied Mr. Young his Fourteenth Amendment due process right to a fair trial by giving jury instruction No. 13, which instructed the jury that the crime of rape in 1962 was a crime of sexual violence, permitting the jury to find that an element of the "predator" charge had been proven based on an unlawful conviction not alleged in the petition.

T. The Statute requires proof of either a mental abnormality or a personality disorder that makes an accused likely to reoffend but the state only presented evidence on a combination of a mental abnormality and personality disorder. The evidence was insufficient and the petition should have been dismissed, as Mr. Young was denied his Fourteenth Amendment due process right to a fair trial.

U. Because of the severity of the deprivation of liberty resulting from a "predator finding", recognized by the Statute's requirement of proof beyond a reasonable doubt, it was a denial of Fourteenth Amendment due process not to instruct the jury that Mr. Young was presumed not to be a "sexually violent predator".

V. The trial court denied Mr. Young his Fourteenth Amendment due process right to a fair trial when it excluded testimony by the defense expert on the ground that non-disclosure of certain areas of testimony violated discovery deadlines.

W. The cumulative effect of the constitutional errors identified in Sections J, K, L, M, N, O, P, Q, R, S, T, U, and V above taken together denied Mr. Young his Fourteenth Amendment due process right to a fair trial.

13. These grounds were presented in the Washington Supreme Court.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? No. The petitioner has an appeal pending in the Washington Court of Appeals not attacking the judgment at issue here, but addressing the application in King County Superior Court of the Supreme Court's decision relating to the hearing on less restrictive alternative and probable cause requirements, and challenging his conditions of confinement as being punitive.

15. Give the name and address of each attorney who represented you in the following stages of the judgment attacked herein:

Preliminary hearing, trial, appeal: Annie Engelhard and Robert C. Boruchowitz, with William Salen, James Doerty, Jennifer Shaw, Leslie Garrison, The Defender Association, 810 Third Avenue, Seattle, Washington 98104.

16. Were you sentenced on more than one count? Not applicable.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? No.

Wherefore, petitioner prays that the Court grant petitioner immediate release from custody and other relief to which he may be entitled in this proceeding.

/s/Robert C. Boruchowitz
Robert C. Boruchowitz
WSBA No. 4563
Attorney Representing Mr. Young

Date: September 14, 1994

I declare under penalty of perjury that the foregoing is true and correct. Executed on

September 14, 1994.
Date

/s/Andre Brigham Young
Signature of Petitioner

The Defender Association
810 Third Avenue No. 800
Seattle, Washington 98104
206 447 3900 Ext. 603

[Filed November 7, 1994]

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

In re the Detention of	)
	) NO. 93-2-15348-1
ELMER CAMPBELL	)
	) FINDINGS OF FACT,
	) CONCLUSIONS OF LAW
	) AND ORDER ON
	) RESPONDENT'S MOTION
	) TO DISMISS BASED ON
	) UNCONSTITUTIONAL
	) CONDITIONS OF
	) CONFINEMENT AT
	) SPECIAL COMMITMENT
Respondent.	) CENTER

This matter came before the court on July 1, 1994, and July 29 of 1994, on Respondent's motion to dismiss this action. Respondent argues that RCW 71.09 is unconstitutional as applied to him due to (a) punitive conditions of confinement and (b) inadequate treatment made available to him at the Special Commitment Center.

The State of Washington appeared through Deputy Prosecuting Attorneys Carol Spoor and Michael Lang. Respondent appeared in person and through his attorneys, Bernadette Foley and David Hirsch. In accordance with its earlier ruling, the Court adopted the seventeen volume factual record generated in a similar hearing on Motion to Dismiss in *In re the Detention of Andre B. Young*, King County Cause No. 90-2-21319-6, heard before the Hon. Harriet Cody of this Court from November 16 to December 15, 1993. The parties supplemented this record with testimony of witnesses, exhibits, legal briefs and memoranda, the ruling entered by United States District Court Judge William Dwyer in *Turay*

v. Weston, No. C91-66WD [sic] (W.D.Wa.), and oral arguments by counsel, all of which have been considered by the Court.

The Court makes the following:

FINDINGS OF FACT

1. Respondent is detained at the Special Commitment Center (SCC) as an adjudged sexually violent predator (SVP) under RCW 71.09.

2. SCC is operated by the Department of Social and Health Services, but is housed entirely within the Special Offender Center (SOC), a Department of Corrections prison facility in Monroe, Washington. The SOC building also houses, in separate units, mentally ill prisoners undergoing temporary treatment, and developmentally disabled prisoners.

3. The SCC facility was designed as a prison prior to the existence of the SCC. The SCC is operated by DSHS with DOC by written interagency agreement. Sharing a physical facility with the DOC under the terms of the interagency agreement requires SCC compliance with a number of DOC prison rules and regulations, some contact between SCC residents and DOC inmates, and dependence of the SCC on DOC for many services necessary to the operation of the SCC, including but not limited to shared use of the SOC law library and visiting rooms, DOC medical services, and use of DOC meal services. SCC residents' lives, like DOC inmates' lives, are affected by the SOC facility design, services and administrative policies.

4. The SCC uses resident monitoring equipment (for example, video and audio monitoring in all program rooms and audio monitoring in all resident rooms) which was installed in the facility by DOC for DOC use in a prison facility. SCC residents are frequently and may at any time be monitored by SCC staff through use of such equipment, without the resident's knowledge.

5. Space limitations and some elements of facility design at the SCC are more restrictive for residents than for prison inmates in DOC facilities which are not specifically designed for mentally ill offenders. The austerity and small size of the SCC facility add to the sense of physical oppressiveness.

6. The SCC is rated medium to close in terms of the facility's external (perimeter) security. SCC's internal security is provided by DSHS with back-up emergency services from DOC. SCC has called DOC staff for a "show of force" against SVP residents at least a half dozen times. SCC's entry security as well as its perimeter security is provided by DOC. SCC residents, like DOC inmates, who may attempt to escape from a yard facility may be shot by DOC guards pursuant to a legal opinion provided by the Washington State Attorney General. SCC residents who have not yet been committed are not permitted to use the large yard.

7. SCC implemented a three level resident security classification system for residents in July 1994. The level system restricts access of some residents to the microwave, refrigerator, outdoor "silos", weight room, and recreational equipment, as well as personal hygiene items. Although the classification system purports to measure the inmate's security risk, it includes non-relevant factors such as an inmate's commitment to the treatment program and participation in group activities. Because the classification includes factors unrelated to security, it lacks a security rationale. Similarly, because it does not relate to or promote treatment goals, it lacks a treatment rationale. The criteria for placement in the Basic and Intermediate levels are vague. Residents could be and have been placed on different levels for the same behavior. Classification under the level system is therefore arbitrary.

8. Each SCC resident has his own personal sleeping and bathroom space, while most DOC inmates share such spaces with other inmates.

9. Pre-commitment and post-commitment detainees are housed together, despite recommendations by all treatment experts who testified at the *Young* hearing (and also Dr. Quinsey in his written evaluation) that segregating these two groups of residents would further the treatment goals of the program.

10. Residents undergoing treatment as well as those choosing not to participate in treatment are housed together, despite recommendations by all treatment experts who testified in the *Young* hearing (and also Dr. Quinsey in his written evaluation) that segregating these two groups of residents would significantly further the treatment goals of the program.

11. All SCC residents are subjected to stringent security procedures even though not all of the offenders present such a security risk. Respondent, however, has failed to present evidence that he should be subject to a lower level of security. Residents are observed when they go to the bathroom, sometimes by female staff. Residents are strip-searched without reasonable suspicion any time they leave and return to the SOC-SCC facility, even for medical appointments and even though they are under constant armed surveillance while gone. At least twice, residents have had their clothes torn off for refusing to cooperate with a strip search. They are patted down whenever they use the "large yard", after every visit and whenever they leave the unit for some other part of the building. No contraband or weapons have ever been found in any such strip search since the opening of the facility. Residents are shackled and hand-cuffed any time they leave the facility, even though they are under constant armed guard. Residents are chained when they are transported to the courts.

While SCC administration asserts that residents' rooms are searched only on reasonable suspicion, all residents' rooms have been searched upon discovery that a staff member's keys were missing. There was no reason to suspect any of the residents had stolen them. No keys were found.

12. Strip searches of Respondent and other SCC residents were conducted by SCC forensic therapists and other unit staff, even though it is undisputed that use of residents' respective therapists to conduct such strip searches is incompatible with the treatment goals of the program because such practices can be harmful to establishing and maintaining a therapeutic relationship based on trust. The practice of including an individual resident's assigned therapist in strip searches of that resident was terminated on December 6, 1993, when the SCC Superintendent first learned, as a result of testimony in the *Young* hearing, that such a practice is inconsistent with the treatment goals of the program.

13. Formal grievance procedures are in place at other DOC facilities, which include but are not limited to providing prisoners with notice and definitions of infractionable offenses and the consequences for violations thereof, and the opportunity for a prompt hearing on any alleged infraction. The SCC has no such formal grievance procedures for its residents. As a result, there has been arbitrary and inconsistent enforcement of rules on the unit. Dr. Nancy Steel [sic], an expert in the custodial treatment of sex offenders, testified that inconsistent enforcement of rules is cruel.

14. Inmates in the DOC Twin Rivers treatment program for sex offenders and in some other DOC programs have access to private trailer visits with their spouses and other family members. There has been no policy in place at the SCC since its commencement in 1990 defining the circumstances under which a resident may become eligible

for such conjugal visits as part of his individual treatment program, despite the testimony of treatment experts (including consultants to the SCC as well as independent experts) that such conjugal and family visits may significantly enhance an individual sex offender's treatment program. Conjugal and extended family visits have not been permitted at SCC. There is no evidence that SCC residents had engaged in inappropriate behavior during conjugal visits while at DOC.

15. No transition, work-release, or aftercare program has been designed or implemented at the SCC, despite the expert opinion of SCC consultant Dr. Vernon Quinsey in 1992 that "the lack of any provision for aftercare and community supervision" is "a fatal problem with the special commitment program as it now stands". All treatment experts (including consultants to the SCC as well as independent experts) agreed that gradually reduced supervision of and well-defined conditions of eligibility for release from detention and an aftercare program are a fundamental and necessary component to any treatment program for this population.

16. The regulations for the SCC in WAC 275-155-050 do not, as a whole, provide a wider range of privileges for residents at the SCC than those to which DOC prison inmates are entitled, either in policy or practice. Access for a limited number of the SVPs in the SCC to personal use of a microwave, refrigerator, video games, and personal purchases of pizzas and other grocery items outside the facility for consumption at the SCC do not, in and of themselves, sufficiently distinguish the privileges available to residents at the SCC from those available to prison inmates. In many respects, the privileges and opportunities for residents at the SCC are less than those to which residents were entitled in DOC prison facilities (for example, limited law library access, shorter visiting hours, fewer vocational, educational and recreational opportunities).

17. The cognitive-behavioral treatment program designed for adjudged SVPs at the SCC has five components: (1) assessment and evaluation; (2) psychotherapy (group and individual); (3) psycho-educational modules; (4) assessment and modification of sexual arousal; and (5) a treatment milieu intended to encompass all aspects of the resident's environment in the facility.

18. The SCC treatment program design was created in consultation with a number of treatment experts, including those experienced in the treatment of prisoners who are subject to determinate sentences in prison facilities (specifically, the Twin Rivers program in the DOC and the Atascadero corrections program in California) as well as those experienced in the treatment of sex offenders who qualify for supervised outpatient treatment in the community.

19. None of the experts consulted by DSHS in the design of its treatment program at SCC had experience in either the design or actual treatment of adjudged SVPs subject to civil commitment of indeterminate duration in secure facilities like the SCC.

20. Key elements of the treatment programs designed and in effect in both the DOC Twin Rivers prison facility and the Atascadero prison in California (used as a model for the SCC) are not included in the design of the SCC treatment program, for example, core relapse prevention groups led by either a clinical psychologist or psychiatric social worker, use of highly structured treatment manuals for all components of treatment, required attendance in therapy groups and psychosocial modules, significant employment opportunities, couples and family therapy, 12-step groups, mandatory pre-release classes and aftercare programs.

21. While all five components of the SCC treatment program design are theoretically in place and available to residents, only parts of the SCC treatment program have been fully implemented or are fully functioning at this time. For example, the only group therapy

which has occurred took place for approximately one year or less (1992 - 1993), met for a maximum of three (3) hours per week, involved 5 residents at the most, was led by one forensic therapist who was not a psychiatrist, psychologist, psychiatric social worker or registered nurse or a certified sex offender treatment provider, and was cancelled by staff because of the inability of the leader to manage the dynamics of the group. A core group was reinstituted after the *Young* hearing, but the leader, a licensed psychologist, is not a certified sex offender treatment provider. Few of the psycho-educational modules have been offered, and arousal reconditioning has only recently begun for four residents.

22. The consensus of all mental health experts testifying in the *Young* hearing is that intensive group therapy is the most critical component of successful sex offender treatment programs, and group therapy is asserted by SCC staff to be the primary treatment modality at the SCC. Yet a number of residents, including committed residents, have been denied admission to the therapy group and have been admitted only into "pre-group", which does not address sex-offense treatment issues. At least one committed resident has been denied admission to the group on the grounds that he has not proved his good faith interest in treatment. Residents are allowed into group therapy only after complete assessments. According to expert testimony at the *Young* hearing, this policy is punitive and counterproductive. The same expert criticized SCC's policy of admitting only residents who had admitted their crimes into group therapy.

23. There are no state certified sexual offender treatment providers on the SCC staff. The only staff member with sufficient expertise to become certified is the Superintendent, who is not directly involved in treatment, whose office is in a trailer outside the facility, and who spends less than three hours per week on the unit. The Program Director had no training or experience in sexual deviancy treatment before being hired by SCC in 1990.

While there is a part-time psychiatrist available, he prescribes medicine for a few residents, assists in psychiatric assessments, and participates in treatment team meetings. He is not otherwise involved in sex offender treatment. Until very recently, the only staff psychologist at SCC was unlicensed and had no experience working with sex offenders when she was hired. She spends approximately seventy percent of her time preparing evaluations. SCC has recently hired a second staff psychologist, who co-leads the core treatment group. A neuropsychologist provides neuropsychological evaluations and treatment recommendations less than two hours per month. Three experienced treatment providers are available for staff consultation but do not provide treatment. A forensic therapist hired in February 1994 to provide direct treatment has recently left the program.

24. The staff members most directly involved in the treatment milieu and management of residents are employees classified as forensic therapists (FTs) and psychiatric security attendants (PSAs), whose relevant experience consists largely of work in DOC prison institutions. The FTs have primary responsibility for providing individual therapy to residents, yet none of them are psychologists, psychiatrists, psychiatric social workers or nurses. They are not provided with a treatment manual; indeed, none exists. The treatment responsibilities of the PSAs are not clearly defined. The PSAs are untrained in sex offender treatment, yet are charged with the responsibility of deciding which sexually explicit materials may be given to SVP's [sic], a judgment which is critical in the resident's deviancy treatment.

25. SCC staff attribute the incomplete implementation of the treatment program design to most residents' choice not to participate in some or all of the program, for a variety of reasons cited by residents which include but are not limited to the following: lack of

confidentiality in all individual and group therapy (evidence of all such participation can and must be provided to the court, notwithstanding WAC 275-155 which provided for residents' right to remain silent until 1993), lack of interest in various aspects of the treatment program, lack of confidence in treatment staff experience and skills, advice of legal counsel, infrequency and unavailability of psychosocial educational modules and therapy groups, lack of incentives and hope because of a perceived absence of a relationship between participation in treatment and release from commitment, absence of an aftercare or transition program, staff inconsistency in applying criteria for participation in various aspects of the treatment program, and resistance to treatment.

26. SCC staff believe that the fundamental reason that most committed SVPs are not engaged in aspects of treatment is because they all believe that it would disadvantage them from a legal perspective in their quest for release. This belief on the part of staff has played a role in the incomplete implementation of the treatment program design. Other reasons which have contributed to incomplete implementation of the treatment program by DSHS also include but are not limited to the small size of start-up program, limited resources, limited number of treatment staff qualified to teach certain psychosocial educational modules, staff inexperience in leading group therapy, staff inexperience in completing sexual deviancy evaluations, staff deference to initiation of treatment by committed residents, and competing administrative demands on professional staff.

27. There are currently more treatment opportunities and programs in place for convicted sex offenders in the DOC Twin Rivers prison facility than there are in the DSHS facility at SCC for civilly committed SVPs.

28. Opportunities for resident employment, structured leisure activities, and education are less at the SCC than at either the DOC Twin Rivers facility or the Atascadero

prison facility, whose prison treatment programs were the models for the design of the SCC treatment program, or at other DOC facilities. DSHS staff indicated that the small size of the SCC as a "start-up" program, budgetary constraints, and space limitations in the existing facility have been administrative constraints on establishing such programs and opportunities for residents who are civilly committed to the SCC for an intermediate term. Recently more employment opportunities have been provided.

29. SCC staff have verbally abused residents, making derisive comments about residents' status or race. On one occasion, a PSA mocked Native American religious practices in front of a Native American resident. Staff have laughed during strip searches of residents. Such derogatory and racist comments and behavior are inconsistent with the treatment purposes of SCC. In addition, residents have observed staff sleeping on duty and reporting to work flushed as though under the influence of controlled substances. Staff have requested a resident to harm other staff and have provided pornography to residents. Some residents are fearful of staff retaliation if they complain about this conduct. Such staff conduct is inconsistent with a treatment milieu.

30. The inadequacies in the treatment program and lack of work-release or aftercare program contribute to the belief in respondent and other inmates that the commitment to SCC constitutes a life sentence.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The burden of proof for purposes of this motion is on the Respondent to prove by a preponderance of the evidence that the actual conditions of his confinement and the actual nature and quality of treatment available to him at the SCC pursuant to RCW 71.09 violate his substantive due process rights.

2. Respondent has been unable to sustain his burden of proving that his detention in the SCC facility, which is both physically located within and physically designed for a Department of Corrections prison facility, violates his substantive due process rights.

3. Respondent has been unable to sustain his burden of proving that the stringent security procedures at SCC are excessive as to him and violate his substantive due process rights.

4. Respondent has been unable to sustain his burden of proving that the application of many DOC institutional rules, regulations and restrictions to the SCC facility (either pursuant to the DOC/SCC joint operating agreement or SCC administrative decisions) violates his substantive due process rights.

5. Respondent has proven that the following aspects of the SCC program violate his substantive due process rights:

a. The failure to clearly define and give notice of rules of conduct and behavior subject to infraction.

b. The lack of grievance procedures for inmate conduct violations.

c. The use of a "level. classification system which reflects neither security considerations nor treatment considerations and whose standards and criteria are only vaguely defined and thus permit arbitrary classification and treatment of residents.

d. Inadequacies in the treatment program consisting of the following:

1) Lack of sufficient staff trained, experienced and certified in treatment of sex offenders.

2) Lack of a comprehensive treatment program which includes timely deviancy

evaluations, highly structured treatment manuals, adequate scheduling of pre-group, core group, and psycho-educational modules, significant employment opportunities within the facility, involvement of family members in treatment, and a conditional release and aftercare program.

3) Lack of individual treatment plans which include objective bechmarks [sic] of improvement so as to document, measure and grade an individual's progress in therapy.

4) Lack of training and supervision of staff, resulting in verbal abuse of residents, lack of trust and rapport with residents and staff, and a milieu counterproductive to treatment.

6. The U.S. District Court has appointed a Special Master to correct deficiencies in staffing and the treatment program at SCC. *See, Turay v. Weston Cause No. C91-664WD (W.D. Wa.)*. A timetable for the Special Master's work has not yet been established.

7. Because respondent is a danger to the community, the State of Washington shall be given a short time in order to correct the deficiencies identified in the Conclusions of Law No. 5.

ORDER

1. Not later than November 23, 1994 the State shall file with the Court a plan to correct the deficiencies identified in Conclusion of Law No. 5. The State shall also provide the Court copies of all reports of the Special Master in *Turay v. Weston* unless release of such information has been restricted by the federal court. Respondent may file a response not later than December 2, 1994

2. Respondent's motion to dismiss is continued to December 9, 1994 at 3:00 p.m.

Done in open Court this 4th date of November, 1994.

/s/Sharon S. Armstrong
Honorable Sharon S. Armstrong

[Filed August 25, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDRE BRIGHAM YOUNG, Petitioner, v. DAVID WESTON, Superintendent of the Special Commitment Center, Respondent.	)	CASE NO. C94-480C ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on cross-motions for summary judgment. This case was previously referred to Magistrate Judge Philip K. Sweigert, who heard oral argument March 24, 1995. Neither party requests further oral argument. Having reviewed the relevant pleadings, memoranda, affidavits, and other documents on file, and having reviewed the transcript of the oral argument, the Court now finds and concludes as follows:

I. BACKGROUND

Andre Brigham Young is currently incarcerated at the Special Commitment Center in Monroe, Washington, serving an indefinite term of involuntary commitment pursuant to Washington's sexually violent predator statute, Wash. Rev. Code § 71.09. He petitions the Court for a writ of habeas corpus, arguing that his confinement is unconstitutional and that the statute is unconstitutional both facially and as applied.

The parties have filed cross-motions for summary judgment on purely legal issues. Petitioner Young requests an evidentiary hearing in the event the issues of law are not resolved in his favor. Because the Court agrees with Young that the statute is unconstitutional on its face, an evidentiary hearing is unnecessary. Nor is it necessary to address the State's argument that one of Young's twenty-two claims, the claim that the cumulative effect of evidentiary errors in the trial court violated his right to a fair trial, has not been exhausted.

II. THE SEXUALLY VIOLENT PREDATOR STATUTE

The Community Protection Act of 1990 comprises fourteen separate sections addressing various issues related to violent crimes, particularly violent sex offenses.[1] Provisions of the Act increase the sentences for sex offenders, require community registration of sex offenders, and provide for compensation for victims, among other things.

The Act also includes the Sexually Violent Predator statute, codified at Wash. Rev. Code § 71.09 (hereafter

[1] The Act was adopted by the Washington Legislature after several widely publicized acts of sexual violence provoked outrage among the public. In what is perhaps the most often cited incident, Earl Shriner, a man with a long history of violent sex offenses, assaulted and sexually mutilated a young boy. In response to this and other incidents, Governor Booth Gardner assembled the Task Force on Community Protection to evaluate and propose changes in the law. The task force found "gaps" in the existing system of determinate, but short, sentencing ranges and indefinite, but inapplicable, involuntary commitment laws. *See Task Force on Community Protection, Final Report to Booth Gardner, Governor, State of Washington*, II-5-6, II-21 (1989); *see also*, D. Boerner, *Confronting Violence: In the Act and In the Word*, 15 U. PUGET SOUND L. REV. 525 (1992). A detailed account of the role of the Task Force in propounding the legislation is unnecessary here. The history of the Sexually Violent Predator Statute and the prevailing climate in which it was adopted is analyzed in great detail in *Predators and Politics: A Symposium on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 507 (1992).

"Statute"). The Statute authorizes the indefinite commitment of defendants determined to be "sexually violent predators." In formulating the Statute, the Legislature was guided by the following findings:

> The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW, which is intended to be a short-term civil commitment system that is primarily designed to provide short-term treatment of individuals with serious mental disorder and then return them to the community. In contrast to persons appropriate for civil commitment under chapter 71.05 RCW, sexually violent predators generally have antisocial personality features which are unamenable to existing mental illness treatment modalities and those features render them likely to engage in sexually violent behavior. The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. The existing involuntary commitment act, chapter 71.05 RCW, is inadequate to address the risk to reoffend because during confinement these offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement as required by the involuntary treatment act for continued confinement. The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment

> modalities for people appropriate for commitment under the involuntary treatment act.

Wash. Rev. Code § 71.09.010.

A "sexually violent predator" is a person "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." Wash. Rev. Code § 71.09.020(1). "Sexually violent offenses" include not only rape, rape of a child, and child molestation, but also such offenses as murder, assault, kidnapping, and burglary, when the offenses are determined to have been "sexually motivated." Wash. Rev. Code § 71.09.020(4).

The Statute does not attempt to define the term "personality disorder." However, "mental abnormality" is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." Wash. Rev. Code § 71.09.020(2). "Predatory" acts, for purposes of the Statute, are "acts directed towards strangers or individuals with whom a relationship has been established or promoted for the primary purpose of victimization." Wash. Rev. Code § 71.09.020(3).

The Statute allows the State to initiate the involuntary commitment process when a person's sentence for a sexually violent offense is about to expire, or when a person who was incompetent to stand trial on a charge of a sexually violent offense or who was found not guilty by reason of insanity of a sexually violent offense is about to be released. Wash. Rev. Code § 71.09.030. To initiate the commitment process, the county prosecutor or the attorney general files a petition alleging that the person is a "sexually violent offender." *Id.* A judge determines whether there is probable cause to believe that the person is a sexually violent predator. Wash.

Rev. Code § 71.09.030. If so, the judge directs that the person be taken into custody and transferred to a facility for evaluation "by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services." *Id.*

A person charged under the statute is entitled to a trial within 45 days after the filing of the petition. Wash. Rev. Code § 71.09.050. The detainee has the right to retained or appointed counsel and the right to retained or appointed experts. Both parties have a right to a jury trial. *Id.* The Statute further provides that

> The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. . . . If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services in a secure facility for control, care and treatment until such time as the person' [sic] mental abnormality or personality disorder has so changed that the person is safe to be at large.

Wash. Rev. Code 71.09.060(1). The Statute forbids detaining persons classified as sexually violent predators in state mental facilities or regional rehabilitation centers, "because these institutions are insufficiently secure for this population." Wash. Rev. Code § 71.09.060(3). Rather, the Statute allows confinement only in facilities located within correctional institutions. *Id.*; Wash. Rev. Code § 10.77.220.

The Statute sets forth no particular requirements for treatment of the detainee, except that care and treatment must conform to "constitutional requirements." Wash. Rev. Code. § 71.09.080. Once each year, the mental condition of a person committed under the Statute is evaluated. Wash. Rev.

Code § 71.09.070. A report of this examination is provided to the court. *Id.*

To obtain release, the detainee must petition the court. If it appears to the Secretary of the Department of Social and Health Services that "the person's mental abnormality or personality disorder has so changed that the person is not likely to commit predatory acts of sexual violence if released," then the Secretary authorizes the detainee to file a petition. Wash. Rev. Code § 71.090.90. The court must hold a hearing within 45 days. *Id.* At the hearing, the State bears the burden of proving beyond a reasonable doubt that the petitioner's mental condition "remains such that the petitioner is not safe to be at large and that if discharged is likely to engage in predatory acts of sexual violence." *Id.*

The detainee may petition the court for release even if the Secretary has not authorized the petition. Wash. Rev. Code § 71.09.090(2). Once each year, the Secretary is required to provide the detainee written notice of his or her right to petition without the Secretary's approval. *Id.* Such notice must be accompanied by a waiver of rights. If the detainee does not waive the right to petition, the court must hold a show cause hearing "to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be at large." *Id.* Although the detainee has a right to counsel at the hearing, the detainee has no right to be present. *Id.* If the court concludes that there is probable cause, it must hold a hearing similar to the original commitment hearing, affording the detainee the right to appointed or retained counsel and experts, and affording both parties the right to a jury trial. *Id.*

Other than these annual review procedures, the detainee has no right to a hearing on a petition for release "unless the petition contains facts upon which a court could find that the condition of the petitioner had so changed that a hearing was warranted." Wash. Rev. Code § 71.09.100.

Absent such a showing, the court is required to summarily deny the petition. *Id.*

III. PROCEDURAL HISTORY

Andre Brigham Young was convicted of rape on three occasions over a period spanning some twenty-two years. On October 24, 1990, one day prior to his scheduled release from prison on a 1985 conviction, the State filed a petition under the Statute. Young was transferred to the Special Commitment Center at the reformatory in Monroe, Washington, and held until his trial in February, 1991. The jury concluded that Young was a sexually violent predator, and he was committed. He filed a personal restraint petition, which was denied. On direct appeal from the trial court, a divided Washington Supreme Court held that the Statute is not unconstitutional. *In re Personal Restraint of Young*, 122 Wash. 2d 1, 857 P.2d 989 (1993).

IV. ANALYSIS

Young asserts that the Statute is unconstitutional on a variety of grounds. Of these, the Court focuses on three: the violation of the substantive due process component of the Fourteenth Amendment; the violation of the Ex Post Facto Clause of Article 1, Section 10 of the Constitution; and the violation of the Double Jeopardy Clause of the Fifth Amendment.

A. Substantive Due Process

The Due Process Clause protects persons from the deprivation of life, liberty, or property without due process of law. U.S. CONST. Amend. V, XIV. The Due Process Clause protects individuals on both procedural and substantive levels. Substantive due process "prevents the government from engaging in conduct that 'shocks the conscience,' *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S. Ct. 149, 152 (1937)." *United States*

v. Salerno, 481 U.S. 739, 107 S. Ct. 2095, 2101 (1987). This substantive component of the Due Process Clause "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 1785 (1992) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983 (1990)). Infringement of a fundamental liberty interest must be narrowly tailored to serve a compelling state interest. *Reno v. Flores*, ___ U.S. ___ , 113 S. Ct. 1439, 1447 (1993).

At the heart of the liberty interests protected from arbitrary government actions is freedom from bodily restraint. *Youngberg v. Romeo*, 457 U.S. 307, 316, 102 S. Ct. 2452, 2458 (1982).

> As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution.

Foucha, 112 S. Ct. at 1791 (KENNEDY, J., dissenting).

For this reason, the Supreme Court has carefully circumscribed the instances in which the state may, for non-punitive reasons, detain or incarcerate an individual. For example, in times of war or insurrection, the government may detain individuals whom it believes are dangerous. *Moyer v. Peabody*, 212 U.S. 78, 84-85, 29 S. Ct. 235, 236-27 (1909). And, under certain circumstances, individuals may be detained pending arraignment, trial, or deportation, on the grounds that such individuals are dangerous to the community, dangerous to witnesses, or that they present flight risks. *See, e.g.*, *Flores*, 113 S. Ct. at 1447-1449 (approving regulatory detention of alien juveniles pending deportation); *Salerno*, 107 S. Ct. at 2103 (approving pretrial

detention of individuals found likely to be a danger to the community pursuant to the Bail Reform Act of 1984); *Schall v. Martin*, 467 U.S. 253, 104 S. Ct. 2403 (1984) (approving post-arrest detention of juveniles found to present a continuing danger to the community); *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975) (approving post-arrest detention of individual pending probable cause determination by a neutral magistrate); *Carlson v. Landon*, 342 U.S. 524, 537-42, 72 S. Ct. 525, 532-35 (1952) (finding no absolute barrier to detention of potentially dangerous resident aliens pending deportation).

The Supreme Court has also held that the state has authority to protect the community from the dangerous tendencies of some individuals who are mentally ill. *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 1809 (1979); *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 1854-1858 (1972). Absent clear and convincing evidence of both mental illness and dangerousness, however, detention is impermissible. *Foucha*, 112 S. Ct. at 1786; *see also*, *Jones v. United States*, 463 U.S. 354, 368, 103 S. Ct. 3043, 3052 (1983); *O'Connor v. Donaldson*, 422 U.S. 563, 95 S. Ct. 2486 (1975) (holding confinement of harmless mentally ill person is unconstitutional).

The State does not argue that the Sexually Violent Predator Statute is comparable to the pretrial detention schemes set forth in *Salerno*. *See Salerno*, 107 S. Ct. at 2102. Such an argument would, of course, fail: *Salerno* and its ancestors authorize pretrial detention of dangerous persons for stringently limited periods of time. *See id.*, at 2101; *Foucha*, 112 S. Ct. at 1787; *cf. Allen v. Illinois*, 478 U.S. 364, 370, 106 S. Ct. 2988, 2992 (1986) (noting, in the context of determining whether a proceeding is criminal or civil for purposes of the Self-Incrimination Clause, that detainee "may be released after the briefest time in confinement"). This is quite obviously not true of the Sexually Violent Predator Statute. Commitment pursuant to the Statute is indefinite.

Indeed, given the State's open acknowledgement of the poor treatment prospects for detainees, prolonged incarceration is to be expected.

The State argues, however, that the Statute passes constitutional muster as a traditional civil commitment scheme, such as that analyzed in *Addington*. This argument also fails. The essential component missing from the Sexually Violent Predator Statute is the requirement that the detainee be mentally ill. Like the scheme rejected in *Foucha*, the Statute here permits indefinite incarceration based on little more than a showing of potential future dangerousness. *See Foucha*, 112 S. Ct. at 1787.

The absence of a mental illness requirement is apparent both in the statutory language and in its legislative history. First, the legislature's findings expressly disavow the notion that the targeted group of persons are mentally ill. As explained in Wash. Rev. Code § 71.09.010, the target group is made up of individuals "who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act." Unlike persons with serious mental disorders, the legislature concluded, sexual predators "have antisocial personality features which are unamenable to existing mental illness treatment modalities," and for which the prognosis of cure is poor. *Id.*

The abandonment of a mental illness requirement is further revealed in the statutory definitions. As noted above, a "sexually violent predator," for purposes of the Statute, is a person who, among other things, "suffers from a mental abnormality or personality disorder." Wash. Rev. Code § 71.09.020(1). Amicus, the Washington State Psychiatric Association, explains that the term "mental abnormality" has neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals.[2] Even

[2] The choice of "mental abnormality," as opposed to "mental illness" or "mental disorder" appears to be deliberate. Washington's involuntary treatment statute, Wash. Rev. Code. § 71.05 allows

accepting the statutory definition of "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others," Wash. Rev. Code. § 71.09.020(2), the term establishes an unacceptable tautology: a sexually violent predator "suffers from a mental condition that predisposes him or her to commit acts of sexual violence.

The concept of a "personality disorder" is similarly unenlightening. The term is undefined in the Statute. In the psychiatric lexicon, a personality disorder is characterized by maladaptive behavior. *See* Amicus Brief, Washington State Psychiatric Association, at 7; *DSM-IV* at 630. As Amicus notes, there are a wide range of personality disorders, none of which is peculiar to sex offenders. As with the concept of mental abnormality, the Statute's use of "personality disorder" evokes a circular definitional structure in which the only observed characteristic of the disorder is the predisposition to commit sex crimes.

Whatever doubt might remain after reviewing the Statute itself is resolved by the legislative history. The Governor's Task Force on Community Protection, whose proposed bill was substantially similar to that enacted, plainly intended to craft legislation to permit the involuntary commitment of persons who are not mentally ill:

> Civil commitment under the involuntary treatment law allows indefinite commitment, but is quite restrictive in its

commitment of persons with "medical disorders," a syndrome or pattern well-recognized among the psychiatric community. American Psychiatric Association, *Diagnostic and Statistical Manual*, at xxiv (Fourth ed. 1994). The legislature's decision to employ a term unrecognized in the psychiatric community, coupled with its provision of a definition of no value to treatment professionals is an indication that the State did not intend the Statute to capture only the seriously mentally ill.

> definitions. Under current laws, sexually violent predators only qualify for civil detention when a mental illness or mental disorder is present. The Task Force examined the histories of some individual violent predators who had been judged not to have a mental illness or mental disorder and therefore were not detainable.

Task Force on Community Protection, Final Report to Booth Gardner, Governor, State of Washington, II-21 (1989).[3]

Thus, this is not a [sic] enactment designed to provide for the commitment of dangerous mentally ill or mentally disordered persons. Rather, the Statute targets persons with "antisocial personality features." Wash. Rev. Code § 71.09.010. As in *Foucha*, persons within the Statute's reach have "an antisocial personality, a condition that is not a mental disease and that is untreatable." *Foucha*, 112 S. Ct. at 1782. But the mere presence of antisocial personality, or other personality disorder falling short of mental illness, is constitutionally insufficient to support indefinite confinement. As the Court explained in *Foucha*:

> [T]he State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there

[3] Indeed, in testimony before the legislature, one member of the Task Force explained that Washington's traditional civil commitment law, Wash. Rev. Code § 71.05, *et seq.*, was inappropriate for Earl Shriner, the perpetrator of the highly publicized assault and mutilation of a young boy, because he was not mentally ill. SENATE LAW & JUSTICE COMMITTEE, Testimony of Professor David Boerner at 1 (Jan. 10, 1990). In describing Earl Shriner, Professor Boerner stated "Mr. Shriner is not mentally ill as that term is defined. He is clearly a problem, and clearly very dangerous, but he doesn't suffer from a classical mental illness."

> is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not ill who could be shown to have a personality that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

Foucha, 112 S. Ct. at 1787.

The Court concludes that the Sexually Violent Predator Statute, allowing as it does the indefinite confinement of persons who are not mentally ill, violates the substantive protections of the Due Process Clause. Predictions of dangerousness alone are an insufficient basis to continue indefinitely the incarceration of offenders who have completed their prison terms.

B. Ex Post Facto

Article I of the United States Constitution provides that the states may not pass any ex post facto law. In interpreting the scope of the ex post facto prohibition, courts have long been guided by the words of Justice Chase in *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798). *See, e.g.*, *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 2721 (1990); *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 2450 (1987). Justice Chase explained his understanding of what fell within the scope of the prohibition:

> [1] Every law that makes an action done before the passing of the law, and which

> was innocent when done, criminal; and punishes such action. [2] Every law that aggravates a crime, or makes it greater than it was, when committed. [3] Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. [4] Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder, 3 Dall. At 390 (emphasis omitted). The ex post facto prohibition ensures that legislative acts "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 964 (1981). In addition, the ban "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.*

Two critical elements must be present for a criminal or penal law to be ex post facto: (1) "it must be retrospective, that is, it must apply to events occurring before its enactment," and (2) "it must disadvantage the offender affected by it." *Weaver*, 101 S. Ct. at 964. The debate here is not whether the Sexually Violent Predator Statute is retrospective or disadvantageous in its application to Young. Rather, the debate concerns whether the Statute is penal or criminal in nature.

The parties cite no Supreme Court decision directly addressing the issue here: whether, for purposes of the ex post facto clause, a law is criminal or penal, as opposed to civil. The Court notes, at the outset, that by labeling the Statute "civil," the State "does not thereby immunize it from scrutiny" under the clause. *See Collins*, 110 S. Ct. at 2721. "Subtle ex post facto violations are no more permissible than overt ones. . . . [T]he constitutional prohibition is addressed to laws, 'whatever their form,' which make innocent acts

criminal, alter the nature of the offense, or increase the punishment." *Id.* (quoting *Beazell v. Ohio*, 269 U.S. 167, 170, 46 S. Ct. 68, 68-69 (1925)).

Where the legislature has indicated an intention to establish a civil scheme, the Court must consider whether that scheme is "so punitive either in purpose or effect as to negate that intention." *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 2641 (1980). Only the clearest proof will suffice to establish the unconstitutionality of a statute on this ground. *Id.*

The Supreme Court has formulated a non-exclusive list of factors to consider in determining whether a statute is penal or regulatory in the context of the procedural safeguards of the Fifth and Sixth Amendments:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 567 (holding unconstitutionally punitive certain statutes that deprived individuals of citizenship without Fifth and Sixth Amendment protections); *see also Allen*, 106 S. Ct. 2988 (1986) (analyzing the issue of whether a commitment statute is civil or criminal for purposes of the Self-Incrimination Clause of the Fifth Amendment). These factors are equally relevant in considering whether the Sexually Violent Predator

Statute is civil or criminal for purposes of the Ex Post Facto Clause. *See Artway v. Attorney General*, 876 F. Supp. 666, 689 (D.N.J. 1995).

The Court concludes that the Statute cannot be classified as civil, considering the relevant factors. First, there is no dispute that Statute subjects individuals to an affirmative restraint. The Statute entails a complete loss of freedom for an indefinite period of time. The potential length of this confinement, and the periodic opportunities for release, are also relevant considerations. In *Allen*, the Supreme Court held that Illinois' Sexually Dangerous Persons Act was civil, partly because, in addition to providing treatment, the Act "established a system under which committed persons may be released after the briefest time in confinement," and were free to "apply for release at any time." *Allen*, 106 S. Ct. at 2992. The Illinois act provides for case reviews every six months. Here, however, a detainee's case is reviewed only once per year. And although the statute purports to allow a detainee to petition for release at any time, in fact a petition is subject to a full adversarial hearing only if (1) the Secretary of the Department of Social and Health Services authorizes the petition or (2) the detainee establishes probable cause that he is no longer dangerous. Further, unlike the Illinois act, Washington's Statute does not provide for conditional release of offenders who cannot be determined with certainty to be dangerous. The lack of conditional release provisions can be expected to result in longer terms of confinement.

Second, the Statute applies to behavior that is already criminal. Indeed, it is expressly limited in its application to persons who have been convicted of a crime or who have been charged with a crime but found incompetent to stand trial or found not guilty by reason of insanity. *Cf. Artway*, 876 F. Supp. At 691.

Third, the Statute, in its operation, will promote the traditional aims of punishment – retribution and deterrence.

In *Allen* the Supreme Court determined that because Illinois had "disavowed any interest in punishment" and was focused solely on providing treatment to mentally disordered sex offenders, its commitment statute was civil, rather than criminal. *Allen*, 106 S. Ct. at 2992. Central to the Illinois statutory scheme is the requirement that the State elect either punishment or treatment at the time the offender is charged. *See Allen*, 106 S. Ct. at 2994 ("the State serves its purpose of *treating* rather than punishing sexually dangerous persons"); *People v. Patch*, 9 Ill. App. 3d 134, 293 N.E.2d 661, 665 (1972); *People v. Allen*, 107 Ill. 2d 91, 481 N.E.2d 690, 695 (1985). In sharp contrast, Washington's Sexually Violent Predator Statute requires that the convicted sex offender serve his sentence prior to commitment; the State has no power to initiate proceedings under the Statute until the sentence of the convicted offender "is about to expire, or has expired." Wash. Rev. Code § 71.09.030. The operation of the Statute is not materially different for persons who are charged with a sex offense but found incompetent to stand trial or found not guilty by reason of insanity. In both instances, the State may initiate proceedings under the Statute only when the person is about to be released or has been released. *Id.*

Thus, despite the State's claims that the Statute is intended only to provide treatment, the State evinces a keen interest in punishment. It is immaterial, for purposes of this analysis, that the punishment aims are primarily expressed in other Washington laws, rather than being incorporated directly into the Statute. The Statute is inextricably linked to the traditional goals of punishment, because it requires, on its face, that the detainee serve his entire criminal sentence before being committed or treated.

The punishment imperative also undermines the State's purported interest in treating violent sexual predators. The Statute forecloses the possibility that offenders will be evaluated and treated until after they have been punished. Of

course, it defies reason to suggest that the mental abnormalities or personality disorders causing violent sexual predation surface only at the termination of a prison term. Common sense suggests that such mental conditions, if they are indeed the cause of sexual violence, are present at the time the offense is committed. Setting aside the question of whether a prison term exacerbates or minimizes the mental condition of a sex offender, it plainly delays the treatment that must constitutionally accompany commitment pursuant to the Statute. The failure of the Statute to provide for examination or treatment prior to the completion of the punishment phase strongly suggests that treatment is of secondary, rather than primary, concern.

The Court concludes that, although there is clearly an alternative purpose to which the Statute may be connected and although indefinite commitment is not necessarily excessive in relation to that purpose, these factors are greatly outweighed by factors favoring the conclusion that the Statute is criminal. As noted above, there is no dispute that, as to Young, the Statute is retrospective and disadvantageous. Accordingly, it stands in violation of the ex post facto prohibition of the Constitution.

C. Double Jeopardy

"[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440, 109 S. Ct. 1892, 1897 (1989). The third of these abuses, multiple punishments, is at issue in this case.

The Double Jeopardy Clause does not apply only to punishment imposed in criminal proceedings; rather, its violation "can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Halper*, 109 S. Ct. at 1901.

> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. . . . [T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. . . . From these premises, it follows that a *civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.*

Id. at 1901-02 (emphasis added and citations omitted).

As explained above, in the Court's analysis of the Ex Post Facto Clause, the Statute at issue here serves the traditional aims of punishment – retribution and deterrence. *Cf. Halper*, 109 S. Ct. at 1902. The analysis applies equally for purposes of the Double Jeopardy Clause. Having once been punished for the commission of a violent sexual offense, the offender is subject to further incarceration under the Statute's commitment scheme. The punishment imperative embodied in the statutory approach, in addition to the secondary nature of the treatment provisions, renders the Statute an unconstitutional second punishment.

V. CONCLUSION

The Court concludes that Washington's Sexually Violent Predator Statute, Wash. Rev. Code § 71.09, violates the substantive due process component of the Fourteenth Amendment, the Ex Post Facto Clause, and the Double

Jeopardy Clause. The other issues raised in the petition for a writ of habeas corpus need not be addressed.

The writ is GRANTED.

In anticipation of appeal, the Court directs the parties to brief the issue of release pending appeal. Each party shall file a brief on this issue no later than September 5, 1995. The parties may file responsive briefs no later than September 7, 1995. The parties shall indicate whether oral argument is requested.

SO ORDERED this 25 day of August, 1995.

/s/John C. Coughenour
John C. Coughenour
United States District Judge

[Filed October 1, 1997]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY,	)	NO. C91-664WD
	)	
Plaintiff,	)	ORDER ON PLAINTIFF'S
v.	)	RENEWED MOTION FOR
	)	CONTEMPT AND
MARK SELING, et al.,	)	DEFENDANTS'
	)	RENEWED MOTION FOR
	)	RELEASE FROM
Defendants.	)	INJUNCTION

Plaintiff is a resident of the Special Commitment Center ("SCC") at Monroe, Washington, having been civilly committed pursuant to a Washington statute, RCW ch. 71.09, as a violent sexual predator. He sued in this court alleging several violations related to his conditions of confinement. At a trial in 1994, the jury found for defendants on all claims but one, i.e., that defendants had failed to provide plaintiff with constitutionally adequate mental health treatment. On June 3, 1994, an injunction was issued which required the defendants to bring the SCC treatment program into compliance with constitutional standards. Dkt. # 220. On September 22, 1994, Dr. Janice K. Marques was appointed as special master to assist is [sic] this process. Dkt. # 261. Dr. Marques has been working with the defendants and SCC residents since that time. She has submitted twelve reports to the court in regard to progress toward compliance and areas in which further work is needed.

On March 6, 1996, a hearing was held on plaintiff's motion for contempt and defendants' motion for release from the injunction. Evidence was received and argument by counsel and *amici curiae* was heard. An order was entered

denying the contempt motion and keeping the injunction in force. Dkt. # 468. Later in 1996, by agreement of counsel, eight other SCC residents were allowed to intervene as plaintiffs for the limited purpose of participating in the administration and enforcement of the injunction. Dkt. # 520.

On January 13, 1997, a hearing was held on plaintiff's renewed motion for contempt, in which the plaintiff-intervenors joined, and defendants' motion for release from the injunction. The court heard testimony by the special master and the ombudsman working with SCC, and argument of counsel and *amici curiae*. At plaintiffs' request, the district judge visited SCC on January 14, 1997, to view the facility. An order dated February 4, 1997, was entered finding that while defendants had made substantial progress toward compliance with the injunction, full compliance had not yet been achieved. The motion for contempt was denied and the injunction was continued in effect. Dkt. # 645.

Plaintiff, joined by plaintiff-intervenors, now renews his motion for contempt, and defendants renew their motion for release from the injunction. Both sides have submitted thorough briefs and declarations. A hearing was held on September 22, 1997, in which the court heard testimony from the special master; from plaintiff-intervenors Herman Paschke, Joel Reimer, and Ronald Petersen; and from defendants Mark Seling and Robert Smith, who are, respectively, the superintendent and clinical director of the SCC.

The February 4, 1997, order stated that the court would expect compliance with the injunction to be complete by the time of the next hearing. The first question is whether that has been achieved. The test is whether defendants now provide plaintiff and the intervenors with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were

confined. *See Youngberg v. Romeo*, 457 U.S. 307, 319-22 (1982); *Ohlinger v. Watson*, 652 F.2d 778 (9th Cir. 1980).

The evidence shows that progress has continued to be made at SCC, but that compliance is not yet complete. Under the leadership of Dr. Seling and Dr. Smith, and with the help of the special master, a clear policy for staff training has been adopted, and resources are available to implement it. Comprehensive treatment plans are being developed to guide the individualized treatment of residents. A treatment database is in place to track the delivery of services. A policy has been adopted for community re-entry. Substantial efforts are being made to improve trust and rapport between the residents and the staff. In that regard, the superintendent's testimony at the September 22 hearing recognized that the injunction had been necessary, and the residents' testimony suggested a growing willingness among the population to accept treatment and end hostilities with the SCC. It appears that the clinical director will be able to spend more time on the living unit than has heretofore been done. A grievance policy has been implemented, and a resident advocate, ombudsman, and dispute resolution resource are in place. An advisory board has been formed to conduct ongoing oversight of the program at SCC, and an independent inspection of care review by mental health professionals has been initiated.

Notwithstanding the foregoing improvements, the defendants have not yet achieved full compliance with the injunction. The central need is to translate into reality a program that exists on paper. Only recently has the Supreme Court removed the long-standing doubt over the constitutionality of statutes such as the one establishing the SCC. *See Kansas v. Hendricks*, 521 U.S. ---, 138 L. Ed. 2d 501 (1997). The program itself, as both Dr. Marques and Dr. Seling testified, is new. What is required is not just a plan but a reality – the genuine providing of adequate mental health treatment to all SCC residents willing to accept it. The

special master testified as to some of the specific elements that illustrate a fully operational program: that the staff members understand the treatment model and their roles within it; that the delivery of services be effective and consistent across treatment teams; that residents know what they must do to move toward release and where they are in the treatment process; that there be ongoing monitoring of the treatment process; that measures of progress be correlated to the goals of treatment; that the residents know the program policies; that policy enforcement be consistent; that the residents be treated with respect; and that the program be able to deal with the long-term needs of those not engaged in treatment.

The overcrowded physical plant at SCC remains a serious obstacle to providing constitutionally adequate mental health treatment. This problem will only be exacerbated as the SCC population grows. A change of location is under consideration by the Washington State Department of Social and Health Services and the Department of Corrections, but no decision has been made. McNeil Island, Washington, has been proposed as a new site, and clearly would be superior to any attempt to expand the existing facility. To enhance the prospects for achieving compliance with the injunction, SCC should be moved to a better facility as soon as possible.

Accordingly, the injunction will remain in force and the special master will continue to serve pending further order of the court. Defendants' motion to dissolve the injunction is denied.

Plaintiff's motion for contempt is also denied. For civil contempt to occur, it must be shown that a party has failed to take all reasonable steps within it power to comply with a court order. *In re Dual-Deck Video Cassette Antitrust Litigation*, 10 F.3d 693, 695 (9th Cir. 1993). In this complex situation, the evidence does not show that the defendants

have failed to take reasonable steps to comply with the injunction.

The injunction should remain in force no longer than necessary to attain full compliance. This may take a year, as plaintiff and the plaintiff-intervenors suggest, or it may take less time. Accordingly, the following schedule is now adopted: A report by the special master, using the process heretofore in effect, will be due on April 20, 1998; a further report, if necessary, will be due on September 28, 1998. If the injunction is not dissolved earlier, a hearing as to compliance will be held at 9:00 a.m. on October 5, 1998. Any party may move for contempt or for dissolution of the injunction before the scheduled hearing.

The clerk is directed to send copies of this order to all counsel of record, to the special master, and to *amici curiae*.

Dated: October 1, 1997.

/s/William L. Dwyer
William L. Dwyer
United States District Judge

[Filed November 25, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY, Plaintiff, v. DR. MARK SELING, Ph.D., et al., Defendants.	NO. C91-664WD
JERRY R. SHARP, et al., Plaintiffs, v. DAVID B. WESTON, et al., Defendants.	NO. C94-121WD
RANDY PEDERSEN, et al., Plaintiffs, v. TIM HILL, et al., Defendants.	NO. C94-211WD

JOHN F. HALL, et al., Plaintiffs, v. LYLE QUASIM, et al., Defendants.	NO. C95-1111WD
RONALD PETERSEN, et al., Plaintiffs, v. WILLIAM DEHMER, et al., Defendants.	NO. C96-415WD FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER RE INJUNCTIVE RELIEF

I. INTRODUCTION

These cases involve the conditions of confinement of persons civilly committed as sexually violent predators at the Special Commitment Center ("SCC") at McNeil Island, Washington, pursuant to a Washington statute, RCW ch. 71.09. The SCC formerly was located at Monroe, Washington. Richard Turay, an SCC resident, brought the first case, No. C91-664WD, claiming that certain conditions of his confinement violated his civil rights and seeking damages and injunctive relief pursuant to 42 U.S.C. § 1983. At a trial in 1994, the jury found for the defendants on all of plaintiff Turay's claims but one, i.e., that defendants had failed to provide him constitutionally adequate mental health treatment. This court then issued an injunction requiring defendants to bring the SCC treatment program into compliance with constitutional standards. When progress was slow, a special master - Dr. Janice K. Marques, who had been nominated by defendants - was appointed to assist defendants in achieving compliance and to submit reports to

the court. Dr. Marques has delivered a series of reports, the most recent being her fourteenth, filed on September 29, 1998 (Dkt. # 965). In 1996, eight other male SCC residents were permitted without objection to intervene as plaintiffs in C91-664WD for the limited purpose of participating in the administration and enforcement of the injunction. In 1996, and again in 1997, plaintiffs moved for contempt and defendants moved to dissolve the injunction; following hearings, the motions were denied. Similar motions were the subject of an evidentiary hearing held on October 6-9, 1998. In advance of the injunction compliance hearing, the court issued an order requesting briefs and evidence on the following:

> 1. What has been accomplished at the Special Commitment Center ("SCC") in each area covered by the injunction, and what, if anything, remains to be done to attain the objective of providing constitutionally adequate mental health treatment.
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> 2. The therapy now being provided or offered.
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> 3. Any release plan, with defined progress goals, that has been adopted.
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> 4. The number of residents currently in therapy, and the number not in therapy.
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> 5. The nature of the housing and treatment being provided to plaintiff-intervenor Laura McCollum.
>
> 6. The extent to which the SCC's being located on the grounds of a prison impedes compliance with the injunction (bearing in mind that the state statute, RCW 71.090.060(3), provides that the "facility shall not be located on the grounds of any state

> mental facility or regional habitation center . . .").
>
> 7. The best available SCC resident population projections for men and women for the next five years and the next ten years.
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> 8. Whether a larger facility for the SCC will be needed and, if so:
>
> (a) Whether it should be located on the grounds of a prison;
>
> (b) Whether, with or without a legislative change, another setting would be better, and what that setting should be; and
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> (c) What alternatives exist for the providing of a larger facility with improved chances of successful treatment.
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> 9. A comparison of the Special Commitment Center program with comparable programs in other states (e.g., California, Kansas, and Minnesota) insofar as relevant to whether injunction compliance has been achieved and, if not, what remaining steps can and should be taken.

Dkt. # 933, July 30, 1998.

The *Sharp* cases (No. C94-121WD and later cases consolidated with it) were commenced by other SCC residents seeking damages and injunctive relief relating to their conditions of confinement. The damages claims of the plaintiffs (Rolando Aguilar, Joseph Aqui, Curtis Beard, Paul Begay, Elmer Campbell, Samuel Donaghe, Anthony Gallegos, John Hall, Herman Paschke, Randy Pedersen, Ronald Petersen, Joel Reimer, Jerry Sharp, Gilberto Soliz, and Richard Turay) were settled in mediation in 1998,

defendants agreeing to pay $150,000 ($10,000 per claimant) plus $250,000 in attorneys' fees. In regard to injunctive relief, the settlement agreement provided:

> Plaintiffs' injunction claims in the *Sharp* consolidated cases, as specified hereafter, are preserved for adjudication beginning on October 6th, 1998 before Judge Dwyer. These include the subject matters addressed in the draft Permanent Injunction of July 27, 1998, that has been sent by the plaintiffs to defendants. More specifically, the parties will ask the court to adjudicate issues raised in the Special Master's 13th Report; the issues identified in the court's Minute Order of July 30, 1998, in the *Turay* case; adequacy of classification and grievance systems, family and extended visitation, enrichment of residential living (including vocational, educational, religious, and hobby opportunities), Department of Corrections [DOC] involvement and program oversight (as outlined in plaintiffs' proposed draft Permanent Injunction). The injunction hearing may also include legal access issues raised by pro se plaintiff Reimer. Defendants, by this settlement agreement, do not waive any objection, or defense of law, or equity as to the merits of any injunctive issues, either jointly and/or severally, under consideration in the adjudication beginning on October 6, 1998, or in pending motions for summary judgment, as to these claims, if unresolved by negotiations.

Dkt. # 537, filed September 1, 1998, at page three.

The partial settlement agreement in the *Sharp* cases also provided:

> On June 25, 1995, the federal district court entered an Order Granting Partial Summary Judgment in this case. The Order for Partial Summary Judgment was based on (1) an Order and Injunction filed by federal district court, order in *Turay v. Weston, et al.*, C91-664WD (June 6, 1994), and (2) selected portions of the following orders: (a) Findings of Fact, Conclusions of Law and Order on Respondent's Motion to Dismiss on Unconstitutional Conditions of Confinement at SCC in *In re Detention of Campbell*, King Co. No. 93-2-15348-1 (November 7, 1994), and (b) Findings of Fact, Conclusions of Law and Order on Respondent's Motion to dismiss on Unconstitutional Conditions of Confinement at SCC in *In re the Detention of Pedersen*, King Co. No. 93-2-09933-9 (November 14, 1994). The parties agree that all prior orders in the *Sharp* consolidated cases constitute the law of the case for purposes of the October 6, 1998, injunction hearing and may be referred to by any party.

Id.

Accordingly, by agreement of the parties and pursuant to Fed. R. Civ. P. 42(a), the claims for injunctive relief in *Sharp* (as defined in the settlement agreement), and the injunction compliance issues in *Turay*, were tried together in an evidentiary hearing held on October 6-9, 1998. The first witness called was the special master, who testified on direct examination as a court witness and then was cross-examined by both sides. The parties then presented their evidence and rested their cases. Thereafter, at the court's request, the parties filed post-trial briefs and proposed findings of fact and conclusions of law. The evidence received, and the arguments, briefs (including pro se plaintiff

Ronald Petersen's late-filed reply brief), and proposed findings and conclusions have been fully considered.

Because the injunction issues were tried together, this order, with findings and conclusions, will be filed in both cases. It should be noted, however, that C91-664WD and C94-121WD have not been consolidated for any other purpose, and remain as separate cases with separate clerk's files.

II. THE CONSTITUTIONAL REQUIREMENT OF MENTAL HEALTH TREATMENT

RCW ch. 71.09 is a civil commitment statute. A sex offender, typically one who has served his prison term or is about to complete his sentence, may be detained and committed under it for an indefinite time. The term "sexually violent predator" is defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." RCW 71.09.020(1). If a committed person petitions for discharge from confinement, the central question is whether his mental abnormality or personality disorder has so changed that he is no longer likely to engage in predatory acts of sexual violence. RCW 71.09.090. The Fourteenth Amendment Due Process Clause of the United States Constitution requires state officials to provide civilly-committed persons, such as these plaintiffs, with access to mental health treatment that gives them a realistic opportunity to be cured or to improve the mental condition for which they were confined. *See Youngberg v. Romeo*, 457 U.S. 307, 319-22 (1982); *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980). These plaintiffs, and others involuntarily committed, cannot simply be warehoused and put out of sight; they must be afforded adequate treatment. Moreover, defendants have a duty to provide plaintiffs with "more considerate treatment and conditions of confinement than

criminals whose conditions of confinement are designed to punish." *Youngberg*, 457 U.S. at 322. Recognizing these requirements, the Washington statute provides that "[a]ny person committed pursuant to this chapter has the right to adequate care and individualized treatment." RCW 71.09.080(2). The state, however, "enjoy[s] wide latitude in developing treatment regimens [for sex offenders]," *Kansas v. Hendricks*, 521 U.S. 346, ___, 117 S. Ct. 2072, 2085 n.4 (1997), and "liability [on a claim for constitutional deprivation] may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg*, 457 U.S. at 323 (1982).

Defendants argue that the deference to be afforded to decisions based upon accepted professional judgment, practice, or standards means that there should be virtually no judicial review, stating: "No one questions that Drs. Smith and Seling [the SCC's superintendent and clinical director] are qualified professionals exercising their discretion. The inquiry should end there." Defendants' Closing Argument, Dkt. # 1010, at 7. That is not the law, and such a view would eviscerate any protection of constitutional rights. The *Youngberg* standard is intended "to prevent a judge or jury from using unguided discretion to balance the individual's liberty interest against the state interest in restraining liberty." *Thomas S. v. Flaherty*, 902 F.2d 250, 252 (4th Cir. 1990) (citation and internal quotation marks omitted). It is not meant to transfer the safeguarding of constitutional rights from the courts to mental health professionals. If a mere expression of opinion by a state-employed superintendent or psychologist were deemed conclusive, the constitutional standard would vanish; conditions of confinement would be upheld without scrutiny, and the outcome would depend on who happened to be in charge of a particular program, with

no consistency from state to state or even from one institution to another within a state.

The *Youngberg* rule is that "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 457 U.S. at 323. That rule is observed in this order. The respects in which the *Sharp* plaintiffs are entitled to injunctive relief are identical to those in which full compliance with the *Turay* injunction remains to be achieved. Most of these shortcomings involve acts or conditions that are not based upon professional judgment at all.

III. SUMMARY OF PRIOR PROCEEDINGS

The evidence in the 1994 trial of plaintiff Turay's case clearly proved a failure to make constitutionally adequate treatment available, and the jury's verdict reflected that (Dkt. # 202). On June 3, 1994 the court, issued an injunction which required the defendants to bring the SCC treatment program into compliance with constitutional standards (Dkt. # 220). The court also directed defendants to file a report by July 20, 1994, describing the steps taken to satisfy the terms of the injunction.

On August 22, 1994, the court found that defendants had failed to present a sufficient plan for compliance, and entered a supplemental order clarifying the terms of the injunction and directing the parties to submit the names and qualifications of two nominees for the position of special master (Dkt. # 240). On September 22, 1994, the court appointed Dr. Janice K. Marques (Dkt. # 261). The order defined the special master's duties as follows: "to provide information and expert advice to defendants to assist them in complying promptly with the injunction herein (Dkt. # 220), and to make periodic reports to the court in regard to defendants' compliance or non-compliance with the

injunction." Dr. Marques has been working with the defendants and SCC residents since that time. She has submitted fourteen reports to the court, which are on file in C91-664WD.

In October 1995, plaintiff Turay filed a motion for further injunctive relief and for contempt. The court granted an unopposed part of the motion that sought appointment of a full-time ombudsman. The request for a contempt finding was denied, but the order noted that "in some respects this part of the motion raises serious issues; for example, defendants still have not complied adequately with the June 3, 1994 order that they 'provide a psychologist or psychiatrist expert in the diagnosis and treatment of sex offenders to supervise the clinical work of treatment staff.'" The order also stated that "[w]ith the help of the special master, the defendants have an opportunity to achieve full compliance with the court's prior orders between now and the time of the March 6 [1996] hearing." (Dkt. # 408).

On March 6, 1996, a hearing was held on plaintiff Turay's renewed motion for contempt and on defendants' motion for release from the injunction. Evidence was received and argument was heard. An order was entered denying the contempt motion and keeping the injunction in force (Dkt. # 468). The order stated that "more remains to be done to achieve full compliance" and that "defendants must work diligently with the special master to achieve full compliance with the injunction."

Later in 1996, by agreement of the parties, eight other SCC residents were allowed to intervene as plaintiffs for the limited purpose of participating in the administration and enforcement of the injunction (Dkt. # 520).

On January 13, 1997, another evidentiary hearing was held of the issue of compliance with the injunction. The district judge visited the SCC at Monroe on January 14, 1997. On February 6, 1997, an order was issued denying plaintiffs' motion for contempt but finding that more

remained to be done to meet constitutional standards (Dkt. # 645). The order noted, among other things, that staff members need experience working "under the direct supervision of an expert in the field;" that "a community transition component . . . is not yet operational;" that "treatment with a resident's family members has not yet been adequately integrated into the program, although progress has been made;" that "each treatment plan, as the special master has testified, should broadly assess a resident's needs and skills beyond the offense behavior;" that "each resident should be able to compare his program to objective measures of progress;" and that "before the injunction is dissolved a structure for objective, external oversight must be in place." The order also stated that: "The court will expect compliance to be complete at the end of this six-month period now provided."

On September 22, 1997, another evidentiary hearing was held on the issue of compliance. On October 1, 1997, the court entered an Order on Plaintiff's Renewed Motion for Contempt and Defendants' Renewed Motion for Release from Injunction, stating in part:

> Notwithstanding the foregoing improvements, the defendants have not yet achieved full compliance with the injunction. The central need is to translate into reality a program that exists on paper. Only recently has the Supreme Court removed the long-standing doubt over the constitutionality of statutes such as the one establishing the SCC. *See Kansas v. Hendricks*, 521 U.S. ---, 138 L. Ed. 2d 501 (1997). The program itself, as both Dr. Marques and Dr. Seling testified, is new. What is required is not just a plan but a reality - the genuine providing of adequate mental health treatment to all SCC residents willing to accept it. The special master

> testified as to some of the specific elements that illustrate a fully operational program: that the staff members understand the treatment model and their roles within it; that the delivery of services be effective and consistent across treatment teams; that residents know what they must do to move toward release and where they are in the treatment process; that there be ongoing monitoring of the treatment process; that measures of progress be correlated to the goals of treatment; that the residents know the program policies; that policy enforcement be consistent; that the residents be treated with respect; and that the program be able to deal with the long-term needs of those not engaged in treatment.

Dkt. # 832 at 4-5.

The October 1, 1997 order also stated that "[t]he overcrowded physical plant at SCC remains a serious obstacle to providing constitutionally adequate mental health treatment." *Id.* at 5. The motions for contempt and for release from the injunction were denied. The order stated that the "injunction should remain in force no longer than necessary to attain full compliance. This may take a year, as plaintiff and the plaintiff-intervenors suggest, or it may take less time." *Id.* at 5. A schedule was set for further reports by the special master and for an October 1998 hearing, with a proviso that "[a]ny party may move for contempt or for dissolution of the injunction before the scheduled hearing." *Id.* at 5.

On March 30, 1998, an Order on Plaintiff's Motion re Authority of Ombudsman was entered (Dkt. # 878), finding that the defendants had attempted to curtail the ombudsman's authority to conduct investigations without first obtaining an order modifying the previously stipulated and ordered definition of the ombudsman's responsibilities. Defendants

were directed "to refrain from any further attempts to alter court-ordered requirements without obtaining court approval."

In her thirteenth report, dated May 14, 1998, the special master made ten "specific recommendations regarding how the program can complete [its] work before the hearing that is scheduled for October 5, 1998." (Dkt. # 901).

On July 14, 1998, the district judge made a second site visit, this time to the relocated SCC facility at McNeil Island.

In her fourteenth report, filed on September 29, 1998 (Dkt. # 965), the special master listed, in each area of the injunction, specific steps still necessary, in her opinion, to achieve compliance with professional standards.

The foregoing summarizes the *Turay* proceedings leading to the October 6-9, 1998, hearing in regard to injunction compliance.

The *Sharp* cases have a simpler history. As noted above, the damages claims were settled and the claims for injunctive relief were preserved and were tried to the court on October 6-9, 1998.

IV. FINDINGS OF FACT

The facts set out below are found by a preponderance of the evidence or by stipulation. Any finding of fact that should be denominated a conclusion of law is adopted as such.

1. Since the September 1997 hearing, notwithstanding the disruption and staff turnover caused by a move of the SCC from Monroe to McNeil Island in April 1998, the defendants have made progress toward establishing a mental health treatment program that will meet constitutional requirements. Dr. Mark Seling, the SCC superintendent, and Dr. Robert Smith, the clinical director,

who have replaced earlier appointees in their official positions and as defendants herein, are qualified professionals.

2. Nevertheless, as shown by the evidence without substantial contradiction, there remain shortcomings that are serious enough to require a finding that constitutional minimum requirements are not yet met. The necessity of keeping the injunction in force has been confirmed by every independent expert who testified or whose opinion otherwise appears in the record, including defendants' expert Dr. Robert Prentky. The evidence provided by two ombudsmen and two resident advocates, who were or are state employees, also confirms that it would be premature to dissolve the injunction now. The injunction should remain in force as long as necessary to assure that the violation of constitutional rights has been cured, but no longer.

3. The respects in which the defendants have not yet made constitutionally adequate mental health treatment available to the plaintiffs, and the corresponding areas in which injunctive relief is warranted, are set forth below. The special master in her fourteenth report has given detailed recommendations in each area. Those recommendations should assist defendants in achieving compliance. Recognizing, however, that the court should not try to micro-manage the institution, and that defendants' professional judgment must be respected, the court will not order every recommended detail, but will make findings and order relief in broader terms as required by the evidence.

4. The applicable professional standards for the treatment of sexually violent offenders have been summarized by the Association for the Treatment of Sexual Abusers ("ATSA"). These are the standards that afford persons committed a realistic opportunity to be cured or to improve the mental condition for which they were confined, and thus meet the constitutional requirement. As set out in Exhibit 78, these standards include the following:

The program should be housed in a treatment-oriented facility that is similar to other settings for persons who are civilly committed in the state. Because these laws have arisen out of a genuine concern of the public for the safety of future victims and the community, programs should be developed and located where they can provide the greatest degree of security while the offender is being treated. Staff in the commitment facility should be qualified and appropriately licensed. Oversight should be provided by both an internal review process and an external body either through a licensing organization or another entity.

The treatment program should be consistent with current institutional standards for the treatment of sexual offenders and include all the components recognized as necessary for maximum treatment potential. Individualized treatment plans are critical and should provide for systematic measurements of the individual's progress. The program should be structured with identifiable phases so individuals can mark their progress in treatment.

Those who successfully complete the inpatient phase of treatment and whose risk is considered manageable in the community should be moved into a conditional release program that includes monitoring and supervision, as well as continued community-based treatment.

5. The findings of fact adopted by the Hon. Barbara J. Rothstein in *Sharp*, which are set out in an appendix to plaintiffs' pre-hearing brief (Dkt. # 989, App. A), have been stipulated to apply in the *Sharp* consolidated cases.

They are therefore adopted as findings herein as to the *Sharp* cases only. The outcome as to injunctive relief would be the same if these earlier findings were not adopted.

6. The constitutionally-required standards for providing mental health treatment are still unmet at the SCC in the following respects:

(a) There is still a need for additional staff training. New residential care staff should finish the orientation training before beginning work on the unit; both residential care and clinical staff should complete mental health treatment training within four months of commencing their employment at the SCC; and advanced training on the treatment of sexual deviance should be provided. No professional opinion supports the absence of such training.

(b) There is still no coherent and individualized treatment plan for each resident complete with understandable progress goals and a road map, to use Dr. Prentky's term, showing the way to improvement and release. Each such plan should include the components recognized as necessary for maximum treatment potential. Each resident who is willing to accept treatment should receive it. No professional opinion supports the absence of such plans or treatment.

(c) There is still inadequate provision at SCC for participation by residents' families in their rehabilitation. Successful treatment depends in part on morale and motivation, both of which have been damaged by unnecessary constraints on family visits. Defendants should set aside a room for visits by family members, should permit such visits with reasonable frequency, and should allow prompt telephone access to residents in cases of family emergency, consistent with security. No professional opinion supports less family participation than that described in this paragraph.

(d) The treatment environment at SCC has severely hampered any attempt to meet constitutional standards. Although McNeil Island affords a better physical facility than the old location at Monroe, the treatment space is inadequate and there is no suitable visiting space. In addition, the treatment environment is damaged by the location of SCC within the perimeters of a prison, the McNeil Island Correctional Center ("MICC"), operated by the Department of Corrections ("DOC"). The intertwining of MICC and SCC results in prison-like conditions and restrictions for SCC residents that have no therapeutic or security-based justification. All concerned, including defendants, recognize that this should not continue. SCC currently has 67 residents and projects a population of more than 150 by the year 2001. The space now used will not accommodate this growth. The only viable long-term solution appears to be, as the ATSA standard states, a separate "treatment-oriented facility that is similar to other settings for persons who are civilly committed in the state." Such a facility should be provided, either on McNeil Island or elsewhere, at the earliest possible time. In the meantime it is essential that steps be taken to reduce the negative effects of the current connection with MICC, as follows:

(i) Eliminate the routine strip searches of SCC residents following every visit. No such strip search policy was deemed necessary at SCC's prior location, and the policy has been followed at McNeil only because it is imposed by DOC on prisoners.

(ii) Eliminate the monitoring of residents' telephone calls and the bar on outgoing calls (other than collect).

(iii) Negotiate with MICC management to obtain better meal and activity schedules, which are now severely restricted, and to eliminate harassment of residents by prisoners.

(iv) Acquire more adequate space within the MICC complex, e.g., by taking over all of A Unit when new space is needed, with yard space adjacent thereto.

(e) To meet minimum constitutional standards the treatment environment must also be improved in the following respects:

(i) New living space should be used to provide some separation between residents in treatment and those who have harassed treatment recipients.

(ii) Fair and reasonable grievance procedures and behavior management plans must be adopted and implemented.

(iii) Reasonable opportunities for educational, religious, vocational/work, and recreational activities must be afforded to all residents. Such opportunities, even for those who reject treatment, are essential to a successful treatment environment.

(f) Program oversight is still insufficient because the SCC's advisory board, although it provides a valuable service, limits itself to policy and planning advice. Oversight must be provided both by an internal review process and by an external body either through a licensing organization or another entity.

7. The foregoing steps, and maintenance of progress made thus far, require defendants to bring a constitutionally adequate program into reality, not merely to describe it on paper.

8. The plaintiffs' claims for injunctive relief adjudicated at the hearing held on October 6-9, 1998, have been established to the extent, and only to the extent, reflected in the foregoing findings.

9. Laura McCollum, SCC's only female resident, was allowed by an order entered on May 2, 1997, to intervene as a plaintiff in C91-664WD for the limited purpose of participating in the administration and enforcement of the existing injunction. At the time, Ms. McCollum was confined pursuant to RCW ch. 71.09 with an otherwise all-male population at the Special Commitment Center, and was being treated together with male residents in group sessions; accordingly, the requirements of Fed. R. Civ. P. 24(a) that she have an interest in the subject matter of the litigation, that she be so situated that disposition of the action might as a practical matter impair her ability to protect that interest, and that her interest was not adequately represented by the existing parties, were deemed satisfied. At the hearing held on October 6-9, 1998, both sides presented substantial evidence concerning Ms. McCollum's treatment and conditions of confinement. On October 20, 1998, however, the Ninth Circuit vacated the order allowing intervention, holding that "McCollum's interest - though broadly analogous to that of the male plaintiffs seeking to vindicate their constitutional rights - is profoundly different and demands consideration separate from theirs." The injunction enforcement order relating to Ms. McCollum, entered herein on June 10, 1997, was accordingly reversed. The Court of Appeals noted that Ms. McCollum "is free to institute an independent § 1983 action on her constitutional claim." *Cunningham v. Weston*, --- F.3d ---, 1998 WL 727537 (9th Cir. 1998). Given the decision of the Court of Appeals, it is not possible to enter findings and conclusions as to Ms. McCollum at this point. She remains free to commence her own lawsuit in regard to the conditions of her confinement and treatment as a person civilly committed pursuant to RCW ch. 71.09. *See* Order on Motion of Laura McCollum's Counsel for Amicus Curiae Status (Dkt. # 1026).

V. CONCLUSIONS OF LAW

From the foregoing findings of fact, the court makes and enters the following conclusions of law:

1. The court has jurisdiction herein pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

2. In the *Sharp* cases, the evidence requires that injunctive relief be ordered in accordance with the findings of fact.

3. In the *Turay* case, plaintiffs' motion for contempt, and defendants' motion for release from the injunction, should be denied. The existing injunction should remain in force and be implemented in accordance with the findings of fact. Ordinarily, injunctive measures ordered against a state agency or official must be no broader than necessary to remedy the constitutional violation, but a remedy may go beyond the precise terms of the specific violation "when there is a record of past constitutional violations and violations of past court orders." *Gary v. Hegstrom*, 831 F.2d 1430, 1433 (9th. Cir. 1987) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1247 (9th Cir. 1982)). This court may "order relief the Constitution would not of its own force initially require if such relief is necessary to remedy constitutional violations." *Gluth v Kansas*, 951 F.2d 1504, 1510, n.4 (9th Cir. 1991) (citing *Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir. 1986)).

4. The only defendants as to whom injunctive relief is necessary are Dr. Mark Seling and Dr. Robert Smith, the SCC superintendent and clinical director.

5. Dates should now be set for a further report by the special master and a hearing to determine whether the existing injunction in *Turay*, and the injunction now issued in *Sharp*, should be continued in force or dissolved.

VI. ORDER

1. Based upon the foregoing findings of fact and conclusions of law, the defendants Seling and Smith, in their official capacities, are hereby enjoined as follows:

(a) To carry out additional staff training at the SCC, with new residential care staff to finish the orientation training before beginning work on the unit, residential care and clinical staff to complete mental health training within four months of commencing their employment, and advanced training on the treatment of sexual deviance to be provided.

(b) To provide a coherent and individualized treatment program for each resident complete with understandable progress goals and a road map showing the way to improvement and release, such plan to include the components recognized as necessary for maximum treatment potential.

(c) To make adequate provision for participation by residents' families in rehabilitation efforts, including setting aside a room for visits by family members, permitting family visits with reasonable frequency, and allowing prompt telephone access to residents in cases of family emergency, consistent with security.

(d) Pending the construction of a separate treatment-oriented facility, to reduce the negative affects of the current connection with MICC by taking the following steps:

(i) Eliminate the routine strip searches of SCC residents following every visit;

(ii) Eliminate the monitoring of residents' telephone calls and the bar on outgoing calls (other than collect);

(iii) Negotiate with MICC management to obtain better meal and activity

schedules, and to eliminate harassment of residents by prisoners; and

(iv) Acquire more adequate space within the MICC complex, e.g., by taking over all of A Unit when new space is needed, with yard space adjacent thereto.

(e) To improve the treatment environment in the following respects:

(i) Use new living space to provide some separation between residents in treatment and those who have harassed treatment recipients;

(ii) Draft and implement fair and reasonable grievance procedures and behavior management plans; and

(iii) Afford reasonable opportunities to all residents for educational, religious, vocational/work, and recreational activities.

(f) To initiate and implement program oversight both by an internal review process and by an external body, either through a licensing organization or another entity.

(g) In the foregoing respects, and in others previously ordered, to take all reasonable steps to bring a constitutionally adequate program into reality rather than merely describing it on paper.

2. The special master will continue to serve pending further order of the court. A further report from her, using the process heretofore in effect, will be due on May 7, 1999. If the injunction is not dissolved earlier, a hearing as to compliance will be held commencing at 8:45 a.m. on May 18, 1999. Any party may move for contempt or dissolution of the injunction before the scheduled hearing.

The clerk is directed to send copies of this order to all counsel of record, the pro se parties, amici curiae, and the special master.

Dated: November 25, 1998.

/s/William L. Dwyer
William L. Dwyer
United States District Judge

[Filed December 23, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD G. TURAY, Plaintiff, v. MARK SELING, Ph.D., et al., Defendants.	NO. C91-664WD
JERRY R. SHARP, et al., Plaintiffs, v. DAVID B. WESTON, et al., Defendants.	NO. C94-121WD
RANDY PEDERSEN, et al., Plaintiffs, v. TIM HILL, et al., Defendants.	NO. C94-211WD
JOHN F. HALL, et al., Plaintiffs, v. LYLE QUASIM, et al., Defendants.	NO. C95-1111WD

RONALD PETERSEN, et al.,	) NO. C96-415WD
Plaintiffs,	) ORDER AMENDING
v.	) ORDER OF
	) NOVEMBER 25, 1998,
WILLIAM DEHMER, et al.,	) DENYING MOTION FOR
	) STAY PENDING APPEAL,
	) AND RENOTING MOTION
	) TO DEFER AWARD OF
Defendants.	) ATTORNEYS' FEES

Following an evidentiary hearing on injunction compliance in the *Turay* case (C91-664WD), consolidated with the trial of the injunctive relief claims in the *Sharp* cases (C94-121WD, etc.), the court on November 25, 1998, entered Findings of Fact, Conclusions of Law, and Order Re Injunctive Relief ("Order") (Dkt. # 1026 in *Turay*, Dkt. # 582 in *Sharp*). The defendants now move for a stay pending appeal, and both sides seek interpretation of the Order's provision regarding strip searches. These issues have been fully briefed, and the briefs and additional declarations filed, together with the earlier record, have been fully considered.

A notice of appeal was filed on December 21, 1998. Fed. R. Civ. P. 62(c) provides that "[w]hen an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal on such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." The factors relevant to exercising discretion on a motion for a stay pending appeal are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuing the stay will substantially injure other parties interested in the proceeding, and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

The present motion seeks to stay the entire Order, and if granted would vitiate the injunction that has been in place in *Turay* for four and a half years while suspending the injunctive relief awarded to the *Sharp* plaintiffs following the October 1998 trial. In a case where men are involuntarily confined under conditions found to be in part unconstitutional, that would be a drastic remedy. The absence of constitutionally adequate mental health treatment at the Special Commitment Center ("SCC") has been found by the jury in the *Turay* trial, by this court in the post-verdict *Turay* proceedings, by the Superior Court of the State of Washington for King County following an evidentiary hearing in a case brought by another resident,[1] by this court in a series of hearings and site visits while the injunction has been in force, by the eminently qualified special master, and by independent experts who testified or whose opinions were placed in evidence at the recent hearing. Defendant Seling, the SCC's current superintendent, testified at the hearing held in the fall of 1997 that the injunction had been necessary, a recognition which boded well for the attainment of full compliance and early dissolution of the injunction. The court

[1] In Cause No. 93-2-09933-9 in the Superior Court of the State of Washington for King County, the Hon. Sharon S. Armstrong found on November 15, 1994, that SCC was depriving a resident of due process by failing to afford constitutionally adequate treatment, citing "(1) Lack of sufficient staff trained, experienced and certified in treatment of sex offenders[;] (2) [l]ack of a comprehensive treatment program which includes timely deviancy evaluations, highly structured treatment manuals, adequate scheduling of pre-group, core group, and psycho-educational modules, significant employment opportunities within the facility, involvement of family members in treatment, and a conditional release and aftercare program[;] (3) [l]ack of individual treatment plans which include objective benchmarks of improvement so as to document, measure and grade an individual's progress in therapy[;] and (4) [l]ack of training and supervision of staff, resulting in verbal abuse of residents, lack of trust and rapport with residents and staff, and a milieu counterproductive to treatment." See also Dkt. # 130 in Sharp. These findings were adopted by stipulation as the law of the case in Sharp. Dkt. # 537, p. 3.

has denied plaintiffs' repeated motions for contempt in the belief that defendants were making good faith efforts to achieve compliance. A tremendous amount of work has been invested by the parties, counsel, special master, and the court to accomplish an inherently difficult task made more difficult by the long-standing doubt (finally resolved by the Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1992)) over the constitutionality of civil commitment statutes such as RCW ch. 71.09 and by the State of Washington's failure, to date, to provide a commitment center separate from a prison. To suspend these efforts at this point for a period of months while appellate review proceeded, absent a clear showing that a stay pending appeal was justified, would be a disastrous mistake.

The defendants argue, first, that the relief specified in the Order goes beyond the scope of the *Turay* injunction. A review of the original injunction and the succeeding court orders, however, makes clear that every part of the relief specified in the Order comes within one or more paragraphs of the original injunction. *See also Gluth v. Kangas*, 951 F.2d 1504, 1510 n.4 (9th Cir. 1991). The argument also overlooks the fact that the October 1998 evidentiary hearing constituted the trial of the claims for injunctive relief in the *Sharp* cases. The issues framed by the pleadings and by stipulation to be tried in *Sharp* plainly encompass the findings, conclusions, and order entered on November 25, 1998.

The Order is eighteen pages in length, and the concluding section reads as follows:

> 1. Based upon the foregoing findings of fact and conclusions of law, the defendants Seling and Smith, in their official capacities, are hereby enjoined as follows:
>
> (a) To carry out additional staff training at the SCC, with new residential care staff to finish the orientation training before

> beginning work on the unit, residential care and clinical staff to complete mental health training within four months of commencing their employment, and advanced training on the treatment of sexual deviance to be provided.
>
> (b) To provide a coherent and individualized treatment program for each resident complete with understandable progress goals and a road map showing the way to improvement and release, such plan to include the components recognized as necessary for maximum treatment potential.
>
> (c) To make adequate provision for participation by residents' families in rehabilitation efforts, including setting aside a room for visits by family members, permitting family visits with reasonable frequency, and allowing prompt telephone access to residents in cases of family emergency, consistent with security.
>
> (d) Pending the construction of a separate treatment-oriented facility, to reduce the negative affects of the current connection with MICC by taking the following steps:
>
> (i) Eliminate the routine strip searches of SCC residents following every visit;
>
> (ii) Eliminate the monitoring of residents' telephone calls and the bar on outgoing calls (other than collect);
>
> (iii) Negotiate with MICC management to obtain better

meal and activity schedules, and to eliminate harassment of residents by prisoners; and

(iv) Acquire more adequate space within the MICC complex, e.g., by taking over all of A Unit when new space is needed, with yard space adjacent thereto.

(e) To improve the treatment environment in the following respects:

(i) Use new living space to provide some separation between residents in treatment and those who have harassed treatment recipients;

(ii) Draft and implement fair and reasonable grievance procedures and behavior management plans; and

(iii) Afford reasonable opportunities to all residents for educational, religious, vocational/ work, and recreational activities.

(f) To initiate and implement program oversight both by an internal review process and by an external body, either through a licensing organization or another entity.

(g) In the foregoing respects, and in others previously ordered, to take all reasonable steps to bring a constitutionally adequate program into reality rather than merely describing it on paper.

2. The special master will continue to serve pending further order of the

court. A further report from her, using the process heretofore in effect, will be due on May 7, 1999. If the injunction is not dissolved earlier, a hearing as to compliance will be held commencing at 8:45 a.m. on May 18, 1999. Any party may move for contempt or dissolution of the injunction before the scheduled hearing.

Order at 16-18.

Paragraph 1(a) of the Order concerns additional staff training. It is based upon a finding that such training is necessary, and essentially adopts a recommendation of the special master. The only objection to it is that it is too rigid. The intent was and is that defendants would have reasonable flexibility in regard to the scope of initial orientation and subsequent training. No amendment or stay would be justified.

Paragraph 1(b) requires "a coherent and individualized treatment program for each resident complete with understandable progress goals and a roadmap showing the way to improvement and release." This element is called for unanimously by all professionals who have testified. There is no reason that the progress made to date cannot be expanded to achieve full and prompt compliance.

Paragraph 1(c) concerns family visits and participation in rehabilitation efforts, which also is undisputed as a necessary component of treatment. The objection is to the requirement of "setting aside a room for visits by family members" on the ground that the prison with which SCC is connected lacks space to do this. The means of compliance will be up to defendants, and a reasonable time will be provided. But the gross inadequacy of the present arrangement cannot be justified simply on the basis of budgetary or structural inconvenience.

Paragraph 1(d) provides that "[p]ending the construction of a separate treatment-oriented facility" certain steps be taken to reduce the negative effects SCC's connection with the McNeil Island Correctional Center ("MICC"). This part of the order has brought the most strenuous objections, but the objections are almost entirely from the Department of Corrections ("DOC") which operates the MICC, and they concern not the SCC as such but DOC's operation of a *prison*.[2] The court has not ordered the DOC to do anything. It is true that RCW ch. 71.09 has the dual purpose of secure confinement and treatment, but it is manifestly untrue that the statute requires (or that the Constitution would permit) the return of these civilly-committed residents to prison. Defendants make the remarkable argument that "[t]he fact that the SCC's program is operated within the perimeter of a prison, and in fact is *mandated* to do so by the Washington Legislature by necessity creates an interface with the Department of Corrections." Defendants' Memorandum in Support of Motion for Stay, p. 9. To the contrary, the statute says only that the "facility shall not be located on the grounds of any state mental facility or rehabilitation center." RCW 71.090.060(3). The Washington Supreme Court, in upholding the statute against ex post facto and double jeopardy challenges, emphasized that the SCC was *not* to be a prison or under DOC's control:

> Persons committed are placed in the custody of the DSHS and housed at a DSHS treatment facility. RCW 71.09.060(1); WAC 275-155. The Department of Corrections has no role in caring for committed sex predators.

In re Young, 122 Wn. 2d 1, 19, 857 P.2d 989 (1993).

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[2] Although the DOC is not a separate legal entity but rather an agency of the State of Washington, its counsel was allowed to file a brief amicus curiae and its superintendent has filed a declaration.

Yet the present motion, insofar as it deals with security and physical facilities, is based on DOC's asserted needs for its prison, and demonstrates the correctness of the testimony of plaintiffs' expert Dr. Craig Haney in open court on October 6, 1998:

> The first is that as I suggested earlier, the Department of Corrections very clearly dominates physically, administratively, procedurally and psychologically the MICC and really in many significant ways encompasses the SCC. It is, for all intents and purposes, a prison. Feels like a prison, looks like a prison, and for the most part operates like a prison.
>
> In my opinion, in addition, in some not insignificant ways, the SCC residents actually have fewer, not more, liberties in comparison to the Department of Corrections prisoners.
>
> It is also my opinion that these things collectively represent impediments to any possibility that any significant therapy or treatment can be done under the present circumstances and in addition, because of the quality of life which is created there and the conditions that have been created there, independently represent or present me with a concern about potential deterioration of people who are kept in the SCC unit under the current circumstances.

Trial testimony at 122-23.

The MICC superintendent asks in her declaration that the court defer to her professional judgment about the needs of the prison. The difficulty with the argument is that SCC is required by constitutional law *not* to be a prison.

Paragraph 1(d) assumes that a separate treatment-oriented facility will be built either on McNeil Island or elsewhere, since that is the plan of defendants and others in state government. Obviously, funding will have to be obtained but the need for funding cannot justify a systematic depravation of constitutional rights. *See, e.g., Miller v. Carlson*, 768 F. Supp. 1341, 1343 (N.D. Cal. 1991), and cases cited.[3] In the meantime, as an alternative to ordering more drastic remedies, the court has ordered that certain steps be taken to improve the treatment environment. The first is elimination of the routine strip searches of SCC residents following every visit, even attorney visits. The professional opinion is unanimous that these are not just degrading but profoundly inimical to successful treatment. Defendant Smith has referred to them as "an abomination." While the SCC was at Monroe - a period of several years - the policy was to conduct strip searches only upon reasonable suspicion that contraband had been passed. Routine strip searches following every visit have been instituted only since the April 1998 move to McNeil Island, and only because DOC requires these for the prison.

Notwithstanding the Washington Supreme Court's determination that the DOC has "no role in caring for committed sex predators," *Young, supra*, DOC now seeks approval of random strip searches of up to fifty percent of the population, while objecting even to that limitation. Both sides ask for clarification of this part of the Order. The evidentiary record shows that random strip searches would be as destructive as routine strip searches in the SCC setting. As

[3] Whether to adopt a sexual predator civil-commitment statute in the first place is, of course, optional with each state. A recent survey showed that eighteen states have such statutes while thirty-two do not. *See* Kimberly A. Dorsett, *Kansas v. Hendricks: Marking the Beginning of a Dangerous New Era in Civil Commitment*, 48 Depaul L. Rev. 113, 159 ns. 10 & 11 (1998). A state that has adopted such a program cannot avoid its constitutional duties to those committed by choosing to locate the facility on prison grounds and then contending that the prison's needs must be paramount.

far as SCC is concerned, there is no justification for either routine or random strip searches, and no doubt of their harmful effect on the treatment environment.[4] The intent of this part of the order was and is that routine or random strip searches of SCC residents will not be made, and that such searches will be made in accordance with the previous policy, i.e., upon reasonable suspicion that contraband has been passed. In view of DOC's security concerns about the prison, and to afford time to consider any appropriate changes in the interface between SCC and MICC, routine strip searches may continue for thirty more days following the date of this order, at which time defendants are enjoined to cease making them and to conduct strip searches only upon reasonable suspicion, as stated above. The Order is amended accordingly.

Paragraph l(d)(ii) of the Order calls for eliminating the monitoring of residents' telephone calls and the bar on outgoing calls (other than collect). The importance of making this change has been established by professional opinion without substantial contradiction. The objection, again, comes from DOC and concerns its operation of the prison. Only the SCC residents, however, would be affected by the change, and there appears to be no technical or mechanical factor that would make it difficult. In fact, the record shows that a telephone having this capacity is already on the premises, but is restricted to use by counsel. No change will be made in this requirement with the understanding, of course, that a reasonable time is allowed for compliance.

Paragraph l(d)(iii) calls upon defendants to "[n]egotiate with MICC management to obtain better meal and activity schedules, and to eliminate harassment of residents by

[4] Defendant Seling states in a declaration that he believes narcotic use by residents was more common at Monroe than at McNeil Island. There is no evidence, however, that any such difference was due to strip search policies.

prisoners." Defendants and the MICC superintendent state that they do not know what is meant by "better." In this context, that word means meal and activity schedules that are more ample and more attuned to the rhythms of ordinary life, as contrasted with the artificial and restricted schedules that have prevailed to date. Recognizing the difficulties of administration, the order requires only that defendants "negotiate" with MICC management to these ends; all concerned with SCC will hope for success in the negotiations.

Paragraph l(d)(iv) directs defendants to "[a]cquire more adequate space within the MICC complex, e.g., by taking over all of A Unit when new space is needed, with yard space adjacent thereto." There is no doubt that more space is needed; even defendants' expert Dr. Prentky testified on October 7, 1998, that the treatment space is "woefully inadequate." (Testimony transcript at 139.) The intent was to order that the defendants *negotiate* to acquire, and the wording is hereby amended accordingly. "E.g.," of course, means "for example"; how and where additional space is acquired will be up to defendants and others in state government. The point for purposes of these cases is that constitutionally adequate mental health treatment requires adequate space for living, treatment, and other activities, and such space must be provided.

Paragraph l(e) calls for further steps to improve the treatment environment, the first, in subparagraph (i), being to "[u]se new living space to provide some separation between residents in treatment and those who have harassed treatment recipients." The necessity for this is undisputed.

Paragraph 1(e)(ii) directs defendants to "[d]raft and implement fair and reasonable grievance procedures and behavior management plans." There is no question that this step is essential or that it remains to be fully carried out.

Paragraph 1(e)(iii) concerns "reasonable opportunities to all residents for educational, religious, vocational/work,

and recreational activities." This is also an undisputed element; the means of fulfilling it is left to defendants' discretion.

Paragraph 1(f) calls for "program oversight both by an internal review process and by an external body, either through a licensing organization or another entity." The need for this, and its absence at this point, are undisputed. A reasonable time will be allowed for compliance.

Paragraph 1(g) states: "In the foregoing respects, and in others previously ordered, to take all reasonable steps to bring a constitutionally adequate program into reality rather than merely describing it on paper." This has been mentioned in earlier orders and remains of prime importance. Compliance must take place within the SCC, not merely in paper plans and programs presented to the court.

For the reasons stated, the Order of November 25, 1998, is amended in part in accordance with the foregoing. As for the requested stay pending appeal, defendants have not made a strong showing that they are likely to succeed on the merits, or that they will be irreparably injured absent a stay. To issue a stay would substantially injure the plaintiffs and the public interest in assuring that constitutional rights are protected. The factors listed in *Hilton v. Braunskill*, *supra*, weigh in favor of keeping the injunction in place pending further order of the court, and the motion for a stay pending appeal is accordingly denied. The defendants' motion to defer any award of attorneys' fees will be noted for January 8, 1999, the noting date for plaintiffs' motion for that relief.

The clerk is directed to send copies of this order to all counsel of record, the pro se parties, amici curiae, and the special master.

Dated: December 23, 1998.

/s/William L. Dwyer
William L. Dwyer
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 99-1185

Mark Seling, Superintendent, Special Commitment Center,

Petitioner

v.

Andre Brigham Young

ORDER ALLOWING CERTIORARI. Filed March 20, 2000.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

March 20, 2000

SUPREME COURT OF THE UNITED STATES

No. 99-1185

Mark Seling, Superintendent, Special Commitment Center,

Petitioner

v.

Andre Brigham Young

ON CONSIDERATION of the motion of respondent for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, granted.

March 20, 2000

Wash. Rev. Code 9A.76.120. Escape in the second degree

(1) A person is guilty of escape in the second degree if:

(a) He or she escapes from a detention facility;

(b) Having been charged with a felony or an equivalent juvenile offense, he or she escapes from custody; or

(c) Having been found to be a sexually violent predator and being under an order of conditional release, he or she leaves the state of Washington without prior court authorization.

(2) Escape in the second degree is a class C felony.

[1995 c 216 § 15; 1982 1st ex.s. c 47 § 24; 1975 1st ex.s. c 260 § 9A.76.120.]

Wash. Rev. Code 10.77.220. Incarceration in correctional institution or facility prohibited—Exceptions

No person confined pursuant to this chapter shall be incarcerated in a state correctional institution or facility: *Provided*, That nothing herein shall prohibit confinement in a mental health facility located wholly within a correctional institution. Confinement in a county jail or other local facility while awaiting either placement in a treatment program or a court hearing pursuant to this chapter is permitted for no more than seven days.

Enacted by Laws 1973, 1st Ex.Sess., ch. 117, § 22, eff. July 1, 1973. Amended by Laws 1974, Ex.Sess., ch. 198, § 17, eff. May 6, 1974; Laws 1982, ch. 112, § 3.